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CAUSES CÉLÈBRES

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1885

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RAPPORT

Des jugements rendus, en Cour Supérieure, à Montréal, par l'honorable Juge Rainville, le 12 mai 1883, dans les causes de *William B. Lambe*, ès-qualité, vs. *La Banque de Toronto*, *William B. Lambe*, ès-qualité, vs. *La Banque des Marchands du Canada*, *William B. Lambe*, ès qualité, vs. *La Banque d'Ontario*, *William B. Lambe*, ès-qualité, vs. *La Banque Molson*, et *William B. Lambe*, ès-qualité, vs. *The Canadian Bank of Commerce* déclarant le Statut de Québec, 45 Vict., chap. 22, intitulé : " Acte pour imposer certaines taxes directes sur certaines corporations commerciales," inconstitutionnel ; par l'honorable Juge Jetté, le 23 mai 1884, dans la cause de *William B. Lambe*, ès-qualité, vs. *The North British & Mercantile Fire Insurance Co.* ; par l'honorable Juge Mathieu, le 7 mai 1884, dans les causes de *William B. Lambe*, ès qualité, vs. *The Export Lumber Company*, *William B. Lambe*, ès-qualité, vs. *The Ogdensburg*

Coal and Forwarding Company, *William B. Lambe*, ès-qualité, vs. *The Williams Manufacturing Company*, déclarant cet acte constitutionnel, et par la Cour du Banc de la Reine, en appel, à Montréal, le 23 janvier 1885, Dorion, J. en C. (dissident), Ramsay, J., Tessier, J., Cross, J. (dissident), et Baby, J., confirmant les jugements des Juges Jetté et Mathieu, et renversant les jugements du Juge Rainville, et déclarant que la Législature Provinciale a le droit d'imposer des taxes directes et indirectes, dans la province, pour des fins provinciales.

COUR DU BANC DE LA REINE.

(En Appel)

Montréal, 23 janvier, 1885.

Présents: Sir A. A. Dorion, J. en C. (dissident); Ramsay, J., Tessier, J., Cross, J., (dissident) et Baby, J.

No 52

THE EXPORT LUMBER COMPANY.

(*Défenderesse en Cour Inférieure*)

Appelante,

et

WILLIAM B. LAMBE, ès qualité.

(*Demandeur en Cour Inférieure*)

Intimé.

Jugé: Que le statut de la législature de la province de Québec de 1882, 45 Victoria, chapitre 22, intitulé: "Acte pour imposer certaines taxes directes sur certaines corporations commerciales," n'est pas *ultra vires*.

Voici les remarques du juge Mathieu qui a rendu le jugement de la Cour de première instance, C. S. Montréal, 7 mai 1884:

Le demandeur, ès-qualité, réclame, par son action, la somme de $204, étant pour la taxe imposée, sur la défenderesse, par le statut de Québec de 1882, 45 Victoria, ch. 22, et allègue, dans sa déclaration, que la défenderesse est un corps politique et incorporé ayant son existence dans la Province de Québec, dans le district de Montréal, et qu'elle fait affaires, comme telle compagnie incorporée, et a son principal bureau dans la cité et district de Montréal, dans la division du Revenu de Montréal; que le premier jour de juillet 1882, au temps de la passation du dit statut, le capital payé de la défenderesse était de $300,000; que la défenderesse avait, alors, et a encore

aujourd'hui un bureau et une place d'affaires dans la cité de Montréal ; que le 3 juillet 1882, la dite défenderesse estdevenue endettée au demandeur ès-qualité, en vertu du dit statut, en la somme de $150, étant pour la taxe principale, et en la somme de cinquante piastres, étant pour la taxe additionnelle, comme ayant un bureau ou place d'affaires en la cité de Montréal ; que l'intérêt sur les dites sommes depuis le 3 juillet 1882, jusqu'à la date de l'institution de l'action s'élève à $4 ; ces sommes réunis formant un montant total de $204, dont le paiement fût demandé à la défenderesse ; et conclut à ce que la défenderesse soit condamnée à lui payer cette somme de $204, avec intérêt sur icelle, à compter de la date de l'institution de la dite action, et les dépens ;

La défenderesse allègue dans son premier plaidoyer, que l'action du demandeur ès-qualité ne peut être maintenue, parceque le prétendu statut, en vertu duquel le demandeur ès-qualité poursuit, n'est pas un statut de la Législature de Québec ; parceque le dit statut comporte avoir été passé par sa Majesté, de l'avis et du consentement de la Législature de Québec, sa Majesté n'ayant aucun pouvoir législatif quelconque, soit seule ou de l'avis et du consentement de la Législature de Québec, pour passer aucune loi ; parceque la Législature de la Province de Québec a seule le droit et le pouvoir de faire des lois sur les sujets mentionnés dans la section 92 de l'acte de l'Amérique Britanique du Nord, 1867, et que le dit prétendu statut a été passé en vertu de l'autorité présumée de la dite section, 92, et n'a pas été fait ou passé par la Législature de Québec, mais par une personne tout à fait différente ;

La défenderesse, dans un deuxième plaidoyer, allègue que, même si ce statut avait été passé par la Législature de Québec, ce qu'elle nie, il était et est inconstitutionnel et *ultra vires*, en autant qu'il s'applique à la défenderesse ; que les taxes qui sont imposées, par ce statut, ne sont pas des taxes directes ; que les dites taxes sont impo-

sées sur certaines classes de la population, et ne sont pas imposées sur toutes les classes de la population dans la province de Québec ; que les dites taxes sont prélévées sur des corporations commerciales et non sur la propriété ; que ces taxes ne tombent pas dans la catégorie de taxes que la Législature de Québec avait le pouvoir d'imposer ; que les dites taxes sont des règlements du commerce, et ne peuvent être imposées de manière à constituer une prohibition de l'exercice de la branche du commerce faite par la défenderesse, et que la défenderesse n'a pas été incorporée et ne tient pas sa charte de l'autorité de la Législature de Québec, et conclut à ce que le dit statut soit déclaré inconstitutionnel, nul et *ultra vires*, en autant qu'il s'applique à la défenderesse, et au renvoi de l'action avec dépens.

La défenderesse a de plus plaidé par une défense en fait.

Le demandeur, ès-qualité, a répondu au premier plaidoyer de la défenderesse que la loi invoquée par le demandeur ès-qualité a été passée avec les formalités voulues, et qu'elle est entrée en force, et il a répondu au deuxième plaidoyer, que la loi, sous l'autorité de laquelle la taxe dont il est question en cette cause est réclamée, est constitutionnelle, et que la Législature de la Province de Québec avait le droit de passer cette loi qui est en force, et oblige la compagnie défenderesse ;

Le 16 Octobre 1883, les parties en cette cause ont produit des admissions signées par elles à l'effet suivant : que la compagnie défenderesse est une compagnie incorporée, en vertu des lois de l'état de New-York, un des États-Unis d'Amérique ; que le capital de la compagnie est de $300,000 ; que tous les actionnaires dans la compagnie résident à New-York, et qu'elle a fait affaires dans la Province de Québec, avant et jusqu'au 1er juillet 1882 ; que la question en cette cause est, quand à la constitutionnalité de l'acte, 45 Victoria, chapitre 22, en autant qu'il a rapport à la défenderesse, et aussi s'il a été passé

par la Législature de la province de Québec, que dans le cas où cet acte serait déclaré *ultra vires*, quant à ce qui regarde la défendeesse, ou qu'il serait déclaré n'avoir pas été passé par le corps législatif autorisé à ce faire, l'action du demandeur ès-qualité doit être renvoyée, avec une recommandation que les frais de la défenderesse soient payés par le gouvernement de Québec; qu'au contraire, si le dit acte était déclaré constitutionnel et avoir été passé par le corps législatif autorisé, le demandeur devra obtenir gain de cause pour le montant réclamé, avec les dépens.

Les questions soumises en cette cause sont donc les suivantes :

1° Le statut de Québec de 1882, 45 Victoria, ch. 22, sanctionné le 27 mai 1882, et intitulé : " Acte pour imposer certaines taxes directes sur certaines corporations commerciales," a-t-il été passé par la Législature de Québec, telle que constituée par " l'Acte de l'Amérique Britanique du Nord 1867 ?"

2° Ce statut est-il de la compétence de la législature de Québec, et les taxes imposées par ce statut tombent-elles dans la catégorie de taxes que la Législature de Québec a le droit d'imposer ?

3o Les taxes imposées par ce statut sont-elles des taxes directes ?

4o L'imposition de ces taxes est-elle nulle, parce qu'elles ne sont pas imposées sur toutes les classes de la population ?

5o L'imposition de ces taxes est-elle nulle parce qu'elles sont imposées sur des corporations commerciales, et non sur la propriété ?

6o Les taxes sont-elles une réglementation du trafic et du commerce, sur lequel le parlement du Canada a l'autorité législative exclusive par le §2 de la s. 91 de " l'Acte de l'Amérique Britanique du Nord, 1867 ?"

7o Le fait que la défenderesse qui fait des affaires en cette province a été incorporée, et que ses actionnaires

résident tous dans l'état de New-York, est-il suffisant pour la soustraire à l'imposition de cette taxe ?

PREMIÈREMENT.

Le statut de Québec de 1882, 45 *Victoria, ch.* 22, *a-t-il été passé par la Législature de Québec.*

Le préambule de ce statut est en ces termes : " Sa Majesté, par et de l'avis et du consentement de la Législature de Quebec, décrète ce qui suit :"

Il a été sanctionné le 27 mai 1882.

Il appert à la *Gazette Officielle* de Québec, publiée par autorité, le 27 mai 1882, et dont cette cour est tenue de prendre connaissance, que son honneur le lieutenant-gouverneur de la province de Québec, s'est rendu, le dit jour, 27 mai, à la Chambre du Conseil Législatif, en la maison du Parlement, à Québec, et que, là et alors, en présence du Conseil Législatif, et de l'Assemblée Législative, il a sanctionné le dit statut de Québec, 45 Victoria chapitre 22, au nom de Sa Majesté, sous le titre de " Acte pour imposer certaines taxes directes sur certaines corporations commerciales."

Il résulte des dispositions de l'Acte de l'Amérique Britanique du Nord 1867, que Sa Majesté, tout en se réservant le gouvernement et le pouvoir exécutifs du Canada, a renoncé à exercer personnellement la souveraineté dans la Puissance du Canada, et dans les provinces, ou plutôt qu'elle a délégué ses pouvoirs, ne se réservant que le droit de *veto*, conformément aux dispositions de la section 56 du dit statut. Par la section 58 du dit statut Impérial, il est décrété qu'il y aura pour chaque province un officier appelé le Lieutenant-Gouverneur qui sera nommé par le Gouverneur-Général en Conseil, par instrument sous le Grand Sceau du Canada. Par la section 71 du dit Statut Impérial, il est décrété que la Législature de Québec est composée du Lieutenant-Gouverneur et de deux chambres appelées le Conseil Législatif de Québec et l'Assemblée Législative de Québec ;

Il résulte de ces dispositions que l'autorité souveraine dans la Puissance du Canada appartient à sa Majesté; que le Gouverneur Général représente et agit pour et au nom de Sa Majesté, dans tous les actes qu'il fait comme tel; que la nomination des Lieutenants-Gouverneurs est faite par le représentant de Sa Majesté, agissant au nom de Sa Majesté, et conséquemment est l'acte de Sa Majesté, et que les Lieutenants-Gouverneurs sont les officiers représentants de Sa Majesté dans les provinces;

Par la section 82 du dit Statut Impérial, il est décrété que le Lieutenant-Gouverneur convoquera l'Assemblée Législative de la Province, par instrument sous le Grand Sceau de la Province, au nom de la Reine, de la même manière que le Gouverneur-Général convoque les Communes, en vertu de la section 38 du dit acte, et, par les sections 72 et 73, il est décrété que les conseillers législatifs seront nommés par le Lieutenant-Gouverneur, au nom de la Reine;

Puisque cette convocation se fait au nom de la Reine, il s'en suit que les procédés de la législature, composée des trois chambres ci-dessus mentionnées se font au nom de Sa Majesté, et que les lois sont passées au nom de Sa Majesté;

L'autorité souveraine de Sa Majesté doit nécessairement être représentée dans le gouvernement de la Puissance et dans le gouvernement des provinces;

Le Gouverneur-Général ne peut exercer l'autorité souveraine dans les provinces, pour les actes qui sont attribués au Lieutenant-Gouverneur, et si cette autorité ne pouvait être exercée que par le Gouverneur-Général, il s'ensuivrait que Sa Majesté ne serait pas représentée dans le gouvernement des provinces;

Dans notre système de Gouvernement, le pouvoir de faire des lois, qui n'appartient qu'à l'autorité souveraine, est un des attributs de la couronne, et il n'y a que Sa Majesté qui puisse faire des lois, avec le concours du parlement;

Le dit statut impérial a reconnu spécialement, dans la section 92, que la législature provinciale avait le droit de faire des lois, et, par là, il a reconnu que l'autorité souveraine était représentée dans cette législature. Dans la cause du *Procureur général d'Ontario* appelant, et *Andrew F. Mercer*, intimé, jugée le 18 juillet 1883, et rapportée à la page 768 du 8o Volume des " Law Reports *House of Lords and Privy Council*," le Conseil Privé a décidé que les biens d'une personne décédée sans héritiers et qui reviennent à la couronne, appartiennent aux provinces, déclarant, par là, implicitement, que la Couronne est, à cet égard, représentée par le gouvernement des provinces.

La section 90 de " l'acte des élections contestées de Québec, 1875 " 38 Victoria, chapitre 8, décrète que le jugement de la cour supérieure, siégeant en révision, sur les pétitions d'élections, ne sera pas sujet à appel.

Le 20 mai 1876, Philippe Landry, député à l'Assemblée Législative de la province de Québec, a été trouvé coupable de menées corruptrices, par la cour supérieure siégeant en révision, à Québec, dans une cause où Joseph Théberge et autres étaient pétitionnaires. Landry présenta une requête à l'honorable Conseil Privé, demandant la permission d'appeler de ce jugement. Il soutenait, dans sa requête, que la Couronne n'étant pas spécialement mentionnée dans cette section 90, ses droits ne se trouvaient pas affectés par cette disposition, et que Sa Majesté pouvait recevoir son appel.

L'honorable Conseil Privé a renvoyé cette requête de Landry, parce qu'il a considéré que l'intention de la législature était, qu'il n'y eût pas d'appel au Conseil Privé, et que, comme la décision de la validité des élections de ses membres était un droit qui appartenait à l'Assemblée elle-même, il fallait adopter son intention dans une mesure ou elle s'était départie de ce droit.

Le préambule de ce statut est absolument dans les mêmes termes que celui qui nous occupe : " Sa Majesté,

par et de l'avis et du consentement de la législature de Québec, décrète ce qui suit."

Le jugement du Conseil Privé est rapporté à la page 102 du 2o Volume des *Law Reports*, House of Lords & Privy Council ; et on voit à la page 108 que Lord Cairns, qui a rendu le jugement de leurs Seigneuries, dit que cet acte a été sanctionnée de la part de la Couronne, et que la Couronne y a été partie (" An act which is assented to on the part of the Crown, and to which the Crown, therefore, is a party.")

D'après ce qui précède, il me paraît certain que ce statut a été passé par l'autorité compétente, savoir : la législature de Québec, composée de Sa Majesté, représentée par le Lieutenant-Gouverneur, et du conseil législatif, et de l'assemblée législative.

DEUXIÈMEMENT.

Le statut est-il de la compétence de la législature de Québec, et les taxes imposées par icelui, tombent-elles dans la catégorie des taxes que la législature de Québec a le droit d'imposer ?

Le dit statut de Québec de 1882, 45 Victoria, chapitre 22, qui fut mis en force le jour de sa sanction, décrète, dans sa première section, qu'afin de pourvoir aux besoins du service public dans cette province, toute compagnie incorporée faisant quelque entreprise, commerce ou affaire, dans cette province, payera annuellement les diverses taxes mentionnées et spécifiées dans la section 3, lesquelles taxes sont imposées sur chacune de ces corporations commerciales. Par la section 3 de ce statut, il est décreté que les taxes annuelles imposées sur les corporations commerciales mentionnées et spécifiées dans la section première de cet acte et payables par elles, seront pour les compagnies, incorporées de $100, avec une somme additionnelle de $50 pour chaque $250,000, ou fraction de $250,000 du capital versé de la compagnie, au-dessus des $250,000, et une taxe additionnelle de $50

pour chaque place d'affaires, manufacture ou atelier dans les cités de Montréal et Québec, et de $20, pour chaque place d'affaires, fabrique ou atelier, dans tout autre endroit. Par la section 4, ces taxes sont payables le 1er jour juridique du mois de juillet de chaque année. Par la section 5, la taxe principale imposée par cet acte est payable annuellement à l'inspecteur des licences du district de revenu, dans lequel la corporation commerciale a son bureau principal, et la taxe additionnelle est payable annuellement à l'inspecteur des licences du district de revenu, dans lequel le bureau, la place d'affaires, la manufacture ou l'atelier pour lequel elle est faite payable est situé. Par les sections 6 et 7, il est décrété que toute semblable taxe annuelle qui ne sera pas payée, pourra être recouvrée avec l'intérêt légal, à compter de la date de son échéance, par action portée en son nom au profit de Sa Majesté, par l'inspecteur des licences du district de revenu, dans lequel elle était payable, intentée dans le district judiciaire où elles sont payables, soit devant la cour de circuit, soit devant la cour supérieure, selon la compétence de la cour, relativement au montant réclamé. Par la section 10, ces taxes forment partie du fonds consolidé du revenu de la province.

Par la section 12 du chapitre 83 des statuts impériaux de 1774, 14, George III, sanctionnée le 13 janvier 1774, et intitulé : " acte qui pourvoit plus efficacement au gouvernement de la province de Québec dans l'Amérique septentrionale," il est décrété qu'il sera et pourra être loisible à Sa Majesté, ses héritiers et successeurs, par un ordre signé de leur main, de l'avis du conseil privé, d'établir et constituer un conseil pour les affaires de la province de Québec..... lequel conseil ainsi constitué et nommé, ou la majorité d'icelui, aura le pouvoir et autorité de faire des ordonnances pour la police, le bonheur et le bon gouvernement de la dite province, du consentement du gouverneur, ou, en son absence, du Lieutenant-Gouverneur, ou commandant en chef."

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23 RUE ST. JACQUES, Près du Palais de Justice.
1885

mer qu'une seule province, pour les fins du gouvernement exécutif et de législation seulement; et il résulte des dispositions de ce statut, que, pour toutes les autres fins, les deux provinces ont conservé leur existence séparée, comme cela appert particulièrement aux dispositions de la section 56 du dit statut de 1840, qui ne met à la charge du fond des revenus réunis des provinces que l'intérêt annuel de la dette publique des provinces du Haut et du Bas Canada, ou de l'une ou de l'autre d'icelle, au temps de la réunion des dites provinces, sans mettre à leur charge le capital de ces dettes.

Par la section 2 de ce statut de 1840, certaines dispositions du statut de 1791 sont abrogées, mais les dispositions qui sont mentionnées plus haut, du dit statut de 1791, ne le sont pas.

Par la section 3 du dit statut de 1840, il est décrété que, depuis et après la réunion des deux provinces, il y aura dans la province du Canada, un conseil législatif et une assemblée qui seront respectivement constitués et composés en la manière qui y est prescrite, et que Sa Majesté aura le pouvoir de faire, dans la province du Canada, par, et de l'avis, et du consentement des dits conseil législatif et assemblée, des lois, pour la paix, le bien-être et le bon gouvernement de la province du Canada, et qui ne devront pas être contraires au statut impérial de 1840, ou aux parties de l'acte de 1791 qui ne sont pas abrogées pas le statut de 1840;

Par la section 43 de ce statut, l'acte impérial de 1778, 18, George III, chapitre 12, est confirmé, et le parlement impérial renonce de nouveau à imposer aucune taxe dans la province du Canada, sauf les droits pour le règlement du commerce, et reconnaît, par là, à la province réunie, le droit qu'elle avait d'imposer des taxes pour se faire un revenu, comme il le reconnaît expressément dans la section 57 du dit statut, qui décrète que l'assemblée législative de la province du Canada aura l'initiative sur tous bills pour l'impositions d'aucnne nouvelle taxe ou impôt.

Le parlement impérial, qui prétendait d'abord exercer le droit d'imposer des taxes sur les provinces sans les consulter, n'a plus maintenant ce droit, auquel il a renoncé par le statut de 1778, et ce droit appartenait à la législature de la province du Bas-Canada et ensuite à celle du Canada-Uni.

Dans la province du Bas-Canada, comme dans la province du Canada-Uni, le droit d'imposer des taxes, et même d'en proposer appartenait à la branche populaire de la législature, et ce droit ne pouvait lui être enlevé que du consentement de l'assemblée législative.

Avant l'union de 1840, les provinces du Haut et du Bas-Canada étaient séparées et indépendantes l'une de l'autre. Chacune de ces provinces, dans un sens limité, était souveraine dans l'étendue de son territoire. L'assemblée d'une province ne pouvait faire des lois obligatoires pour l'autre. Ces provinces n'avaient pas le droit de former d'union entre elles, sans l'assentiment de l'Angleterre, et l'union qui a été formée en 1840 l'a été par le parlement anglais. La constitution de 1840 qui consacra l'union des deux provinces, reconnût cependant leur existence distincte, en décrétant l'égalité de représentation, et d'autres dispositions qui font voir que l'autonomie de chacune de ces provinces n'était pas complètement anéantie. Il y avait, par exemple, un procureur-général du Haut-Canada et un procureur-général du Bas Canada.

Ce que dit Story des colonies anglaises, avant la révolution américaine, peut s'appliquer aux provinces du Haut et du Bas-Canada, avant l'union de 1840, et à ces provinces, même sous l'union et lors de la confédération.

" Chaque colonie," dit Story, (Constitution des Etats-Unis, traduction de Paul Odent, vol. 1, page 103,) " était indépendante des autres ; chacune, dans un sens limité, était souveraine dans l'étendue de son territoire ; l'assemblée d'une province ne pouvait faire des lois obligatoires pour une autre, ni conférer des privilèges susceptibles d'être possédés ou exercés par une autre, pas plus que

cela n'aurait pu se faire à l'égard des états étrangers indépendants."

" Les colonies n'avaient pas le droit de former entre elles des unions ou des alliances obligatoires sans l'assentiment de la mère-patrie, et quoique leurs besoins réciproques les amenassent à s'associer dans un intérêt de défense commune, ces confédérations existèrent plutôt comme une tolérance, que comme un droit."

"Quant aux rapports politiques des colonies avec la mère patrie, il n'est pas aisé d'établir les limites exactes de leur dépendance, et l'étendue de la souveraineté qui pouvait être légalement exercée sur elles par la couronne ou par le parlement. A l'égard de la couronne, toutes les colonies reconnaissaient qu'elles lui devaient fidélité, comme à leur seigneur souverain, quoiqu'on n'eût pas défini la nature des pouvoirs qu'elle pouvait exercer en cette qualité." (*Idem*, p. 105.)

Quant au droit du parlement de faire des lois obligatoires pour les colonies, on ne peut le définir avec précision, à cause de l'obscurité qui a toujours régné sur cette matière, difficulté qui se trouve augmentée par la jalousie réciproque des parties. Le gouvernement de la Grande-Bretagne maintint toujours la doctrine que le parlement pouvait obliger les colonies dans tous les cas." (*Idem*, page 108.)

" La politique des colonies paraît avoir été de se soustraire le plus possible à toute reconnaissance d'une telle autorité; excepté dans les circonstances où la nécessité les obligea d'acquiescer à des mesures prescrites expressément par le parlement. Nous avons déjà vu que, dès les temps les plus anciens, les colonies résistèrent à toutes taxes qui avaient été imposées sans l'assentiment de leurs législatures locales." (*Idem*, p. 109.)

Bien que le droit de taxer soit, dans un sens, un attribut de la souveraineté, cependant, sous la constitution anglaise, ce droit n'appartient pas à la couronne, et un sujet anglais ne peut être contraint de payer aucune autre taxe ou im-

position, même pour la défense du Royaume ou le maintien du gouvernement, que celle qu'il a consentie, par lui-même ou par ses représentants en parlement. Ce droit a été formellement reconnu, d'abord pour les habitants du Royaume-Uni, par les statuts 25, Edouard I, chapitres 5 et 6, et 34, Edouard I, stat. 4, chapitre 1er, et 14, Edouard III, stat. 2, chapitre 1, et affirmé de nouveau solennellement, par la Chambre des Communes en Angleterre, dans la résolution du 6 juillet 1860 ; et, pour les colonies, il a été formellement reconnu par le statut ci-dessus mentionné de 1778, dont la principale disposition est en ces termes : " Whereas taxation, by the parliament of Great Britain, for the purpose of raising a revenue in his Majesty's colonies, provinces, and plantations in North America, has been found, by experience, to occasion great uneasinesses and desorders, among his Majesty's faithful subjects, who may nevertheless be disposed to acknowledge the justice of contributing to the common defence of the Empire, provided such contribution should be raised under the authority of the general court, or general assembly of each respective colony, province, or plantation ; and whereas, in order, as well to remove the uneasinesses, and to quiet the minds of his Majesty's dominions, it is expedient to declare that the king and Parliament of Great Britain will not impose any duty, tax, or assessment, for the purpose of raising a revenue in any of the colonies, provinces, or plantations : may it please Your Majesty that it may be declared and enacted ; and it is hereby declared and enacted by the king's most excellent majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present parliament assembled, and by the authority of the same, that, from and after the passing of this act, the king and parliament of Great Britain will not impose any duty, tax, or assessment whatever, payable in any of His Majesty's colonies, provinces and plantations in North America or the West Indies ; except only such duties as

it may be expedient to impose for the regulation of commerce ; the net produce of such duties to be always paid and applied to and for the use of the colony, province, or plantation, in which the same shall be respectively levied, in such manner as other duties collected by the authority of the respective general courts, or general assemblies of such colonies, provinces, or plantations, are ordinarily paid and applied."

Le droit du peuple, quand au prélèvement des impôts et aux appropriations des deniers publics est tellement bien reconnu et incontestable qu'on ne permet pas à la chambre des Lords d'amender le bill des subsides, et qu'on ne leur permet pas non plus d'amender les principales dispositions des actes créant des impots. On a même été plus loin, lors de la passation de l'acte d'union en 1840, on a alors refusé aux Lords le droit d'amender la clause prescrivant l'ordre des charges sur le fonds consolidé de la colonie.

Il résulte de ce que dessus, qu'avant la Confédération ou l'union des provinces, en 1867, le droit d'imposer des taxes appartenait au peuple et aux législatures des provinces composées de leurs représentants, et que ce droit ne pouvait être exercé que sur la proposition des représentants du peuple réunis en assemblée ; et ce droit ne pouvait leur être enlevé sans leur consentement formel.

Le droit du peuple des provinces de proposer lui-même les taxes est encore reconnu, pour le Canada, par la section 53, et, pour les provinces composant le Canada, par la section 90 du dit acte d'union de 1867, et son exercice est sauvegardé de la même manière qu'il l'est pour les Communes du Canada.

Il est expressément reconnu, dans le préambule de l'Acte de l'Amérique Britannique du Nord, 1867, que cet acte est passé, pour se conformer au désir exprimé par les provinces du Canada, de la Nouvelle-Ecosse et du Nouveau-Brunswick, de contracter une union fédérale, pour ne former qu'une seule et même puissance, sous la Couronne

du Royaume Uni de la Grande-Bretagne et d'Irlande, avec une constitution reposant sur les mêmes principes que celle du Royaume-Uni, et il y est déclaré qu'il est opportun, concurremment avec l'établissement de l'union, par l'autorité du parlement, non seulement de décrêter la constitution du pouvoir législatif de la puissance, mais aussi de définir la nature de son gouvernement exécutif.

Il résulte du préambule du dit statut que le but de cet acte, et l'unique but de cet acte, a été de sanctionner l'union fédérale, c'est-à-dire l'alliance des provinces, et de décrêter la constitution du pouvoir législatif de la Puissance, et de définir la nature de son gouvernement exécutif.

Il est vrai que la section 3 de ce statut dit que les provinces ne formeront qu'une seule et même puissance, sous le nom de Canada, mais on doit entendre ces expressions dans le sens mentionné dans le préambule qui dit que les provinces ont exprimé le désir de contracter une union fédérale. C'est une union fédérale que les provinces ont contractée. C'est un traité fait entre elles, suivant l'expression de Lord Carnavon, dans son discours prononcé à Montréal, l'an dernier. Elles ont consenti à ce que la Puissance du Canada, c'est-à-dire leur union, fut représentée par un gouvernement souverain, pour les fins générales de l'union, mais elles n'ont abdiqué de leurs droits antérieurs que ceux qui sont exclusivement conférés au parlement de la Puissance, et les autres droits elles les ont conservés dans toute leur plénitude.

Quel est le nom que le peuple donne à l'union des provinces, le nom que les membres de la conférence de Québec lui ont donné d'abord, le mot que l'on emploie généralement partout pour désigner cette union ? C'est le mot de *confédération.*

Le mot confédération vient du mot latin *confœderatio* du mot *cum*, avec, et du mot *fœdus*, *fœderis*, alliance. Voici ce que dit Larousse, dons son *Dictionnaire*, au mot *confédération:* " Union de plusieurs Etats qui se soumet-

tent à un pouvoir général, tout en conservant un gouvernement particulier."

Voici ce que dit Webster, au mot *Federal*, dans son *Dictionnaire : Federal*, league, treaty, compact, specifically, composed of states or districts which retain only a subordinate and limited sovereignty, as the Union of the United States, or the Sanderbunt of Switzerland, constituting or pertaining to such a government, as the *Federal Constitution.*

Ce sont les provinces qui ont fait cette union, cette alliance, et elles ont encore tous les pouvoirs qu'elles avaient, sauf ceux auxquels elles ont expressément renoncé. Les provinces ont créé et constitué, par la législation du parlement impérial, qu'elles ont sollicitée, le gouvernement fédéral, comme leur agent pour l'administration des affaires générales des provinces et du peuple des provinces.

Par cet acte, et notamment par les sections 5 et 6, l'union des deux Canada qui avait été décrétée, pour les fins susdites, par le statut impérial de 1840, a été rompue, et les provinces du Haut et du Bas-Canada, maintenant constituant les provinces d'Ontario et de Québec, ont été remises dans la même position qu'elles avaient, avant l'union de 1840, comme les provinces du Nouveau-Brunswick et de la Nouvelle-Ecosse conservèrent, en vertu de la section 64 du dit statut, la constitution de l'autorité exécutive, et en vertu de la section 88, la constitution de la législature qu'elles avaient auparavant, sujettes aux dispositions du dit acte de 1867, et, par cet acte de 1867, qui a été passé à leur demande et conformément à leur désir, elles n'ont pas renoncé à leur autonomie, mais ont conservé, pour leur gouvernement interne, tous leurs droits, pouvoirs et prérogatives.

Les seuls changements qui sont faits, par le statut de 1867, aux constitutions des provinces, telles qu'elles existaient auparavant, ne sont que ceux qui furent nécessités par l'établissement du nouvel état de choses, et rien, dans

cet acte, n'enlève d'une manière générale les pouvoirs qui appartenaient autrefois aux provinces. Les provinces ne tiennent pas leurs pouvoirs du gouvernement fédéral, mais au contraire, ce sont les provinces elles-mêmes qui font une alliance ou société pour créer le gouvernement fédéral, et lui accordent les droits qui sont mentionnés dans ce statut, sans renoncer à ceux qu'elles avaient auparavant, pour les fins provinciales, et comme, dans le cas d'une société, la société tient ses pouvoirs des associés, et non les associés de la société.

L'union des provinces pourrait être rompue sans affecter la position des provinces qui resteraient ce qu'elles étaient avant l'union.

Par la section 129 de ce statut, il est décrété que, sauf toutes dispositions contraires prescrites par cet acte, toutes les lois en force dans le Canada, dans la Nouvelle-Ecosse ou le Nouveau-Brunswick, lors de l'union, continueront d'exister dans les provinces d'Ontario, de Québec, de la Nouvelle-Ecosse et du Nouveau-Brunswick, comme si l'union n'avait pas eu lieu.

Cette réserve de leurs anciens pouvoirs, par les législatures provinciales, résulte encore des dispositions de la la section 65 du dit statut de 1867, qui décrète que tous les pouvoirs, attributions et fonctions qui, par aucun acte du parlement de la Grande-Bretagne, ou du parlement du Royaume-Uni de la Grande-Bretagne et d'Irlande, ou de la législature du Haut-Canada, du Bas-Canada, ou du Canada, avant ou lors de l'union. étaient conférés aux gouverneurs et lieutenants-gouverneurs respectifs de ces provinces, ou pouvaient être par eux exercés, de l'avis du conseil exécutif, ou individuellement, seront, en tant qu'ils pourront être exercés, après l'union, relativement au gouvernement d'Ontario et de Québec, conférés au lieutenant-gouverneur d'Ontario et de Québec respectivement, et des dispositions de la section 135 qui décrète que, jusqu'à ce que la législature d'Ontario ou de Québec en ordonne autrement, tous les pouvoirs, droits, devoirs,

fonctions, obligations ou attributions conférés ou imposés au procureur-général, solliciteur-général, secrétaire et régistraire de la province du Canada, ministre des finances, commissaire des terres de la couronne, commissaire des travaux publics et ministre d'agriculture et receveur-général, lors de la passation du dit acte, par toutes lois, statuts ou ordonnances du Haut-Canada, du Bas-Canada et du Canada, n'étant pas d'ailleurs incompatibles avec le dit acte, seront conférés ou imposés à tout fonctionnaire qui sera nommé par le lieutenant-gouverneur, pour l'exécution de ces fonctions ou d'aucune d'elles ; et aussi par la section 117 qui décrète que les diverses provinces conserveront respectivement toutes leurs propriétés publiques dont il n'est pas autrement disposé dans cet acte ; cette disposition indiquant clairement que l'acte impérial n'a pas entendu créer des provinces nouvelles, mais qu'il a entendu que les provinces telles qu'elles existaient ci-devant, continueraient à exister, puisqu'il a décrété qu'elles conserveraient leurs propriétés publiques, et que, si ces provinces eussent été nouvelles, dans l'intention du législateur, il aurait dit que les diverses provinces, formant le Canada, auraient le pouvoir qu'avaient les anciennes provinces, mais ne se serait pas servi du mot " conserver." On ne peut inférer, du fait que la section 92 du dit statut, qui fait mention des pouvoirs exclusifs des législatures provinciales, ne décrète pas que la législature pourra faire des lois pour la paix, l'ordre et le bon gouvernement de la province, comme cela est décrété par la section 91 qui accorde ce pouvoir au parlement de la puissance du Canada, que les provinces n'ont pas le droit de faire des lois, pour le bon gouvernement de la province, vu qu'il n'était pas nécessaire de conférer aux provinces le pouvoir de faire des lois pour le bon gouvernement de la province, en autant qu'elles avaient déjà ce droit par une constitution octroyée antérieurement, mais qu'il était nécessaire, comme on vient de le voir, de décréter, d'une manière générale, les pouvoirs du gouvernement de

l'union qui n'existait pas auparavant, et que les provinces désiraient créer pour leurs fins de l'union.

Cette absence de disposition, quant aux pouvoirs généraux des législatures provinciales, ne fait que confirmer l'opinion déjà émise, comme cela est d'ailleurs formellement déclaré dans le préambule de ce statut, qu'il n'a été passé que dans le but de créer le pouvoir fédéral, laissant aux provinces les constitutions qu'elles avaient auparavant, ainsi que leurs pouvoirs, sauf, tel que modifié pour les circonstances nouvelles où elles allaient se trouver.

A l'époque de l'union, en 1867, tous les pouvoirs législatifs et exécutifs qui appartiennent aujourd'hui au gouvernement fédéral et aux provinces, appartenaient à ces dernières, et l'acte d'union n'a pas créé des pouvoirs nouveaux, mais a accordé au gouverment fédéral certains pouvoirs communs avec les provinces, et, de plus, certains pouvoirs exclnsifs retranchés de ceux des provinces.

Le premier paragraphe de la section 91, en conférant au parlement du Canada, le pouvoir de faire des lois, pour la paix, l'ordre et le bon gouvernement du Canada, relativement à toutes les matières, ne tombant pas dans les catégories de sujets par cet acte exclusivement assignés aux législatures des provinces, n'a pas abrogé les constitutions et les droits de provinces, et cette disposition ne donne pas, qu'on le remarque bien, des pouvoirs exclusifs au parlement du Canada sur toutes les matières ne tombant pas dans les catégories de sujets exclusivement assignés aux provinces, mais elle confère au parlement du Canada le pouvoir de faire des lois pour les fins de l'union, relativement à toutes les matières qui ne lui sont pas expressément interdites par la section 92; cette disposition ne doit s'entendre que comme conférant le droit de faire des lois affectant toutes les provinces, et concernant leurs intérêts communs, mais ne peut s'entendre des lois qui n'affectent que l'une ou l'autre des provinces.

Il faut entendre de la même manière le dispositif de la dernière partie du premier paragraphe de la dite section

91, qui décrète que l'autorité législative exclusive du parlement du Canada s'étend à toutes les matières tombant dans les catégories de sujets qui sont énumérés dans cette section; et le mot " exclusif " ne doit pas être pris à la lettre, mais doit seulement s'interprêter comme manifestant l'intention des provinces que le parlement du Canada aurait le pouvoir exclusif de faire des lois pour toutes les provinces et pour l'union, mais seulement pour l'union, sur les sujets qui y sont mentionnés. Prenons, par exemple, le § 1 de la section 91 qui donne au parlement du Canada l'autorité législative exclusive sur la dette et la propriété publiques. Si cette disposition se trouvait seule dans la loi, au sujet de la dette, il en faudrait conclure, en adoptant la prétention de la défenderesse que le gouvernement fédéral a seul le droit de contracter des dettes. Or, cela ne se peut pas, ce qui indique que ce § a évidemment rapport à la dette seule de l'union, et n'est exclusif que dans ce sens. Le § 3 de la section 92 qui donne à la législature de la province le pouvoir exclusif d'emprunter des deniers, sur le seul crédit de la province, ne donne pas à la province un droit qu'elle n'avait pas avant, mais il a été inséré dans l'acte pour limiter le pouvoir du parlement fédéral.

Ces dispositions de la section 91 confèrent au parlement du Canada tous les pouvoirs ordinaires d'un gouvernement pour les fins de l'union seulement, et créent dans la Puissance du Canada un nouveau gouvernement pour faire des lois que les provinces, en s'entendant, avaient auparavant le droit de faire.

Je ne puis mieux faire, pour me justifier de dire que les provinces ont conservé la constitution et les pouvoirs qu'elles avaient avant l'union de 1867, sauf les modifications spécialement mentionnées dans l'acte d'union, que de citer les remarques du juge-en-chef Dorion et du juge Sanborn, dans l'affaire des *Tanneries*.

Voici ce que disait le juge-en-chef : " We know that, by the confederation act, the legislature of the several

provinces are not merely ordinary corporations in the ordinary sense of the word. They are, no doubt, corporations in one sense, who derive their authority from superior authorities to which they are bound, but not in that limited sense in which we usually take the word corporation. There is no difference between the powers of the local and dominion legislature, within there own sphere. That is, the powers of the local legislature, within its own sphere, are co-extensive with the powers of the Dominion government within its own sphere. The one is not inferior to the other. I find that the powers of the old legislature of Canada are extended to the local legislatures of the different provinces. We have a government modelled on the British constitution, we have a government in all the provinces, and these powers are not introduced by legislators, but in conformity with usage. It is founded on the consent and recognition of those principles which guide the British constitution. I do not read that the intention of the new constitution was to begin an entirely new form of government, or to deprive the legislature of any of the powers which existed before, but to effect a division of them, some of them are given to the local legislatures, but I find none of them curtailed."

" In substituting the new legislation to the old, the new legislature has, in all those things, which are special to the province of Quebec, all the righs of the old legislature, and they must continue to remain in the province of Quebec, as they existed under the old constitution."

Voici ce que dit le juge Sanborn : " The British North America Act of 1867 was enacted in response to the petition of the provinces of Canada, Nova-Scotia and New-Brunswick, as stated in the preamble of the act, to be federally united into one dominion, under the crown of the United Kingdom of Great Britain and Ireland, with a constitution similar in principle to that of the United Kingdom."

" The powers of legislation and representative government, upon the principle of the British constitution, or as it has commonly been called, responsible government, were not new to Canada. They had been conceded to Canada and exercised in their largest sense from the time of the Union act of 1840, and in a somewhat more restricted sense from the act of 1791 to 1840."

" The late province of Lower Canada was constituted a separate province by the act of 1791, with a governor and a legislative council and legislative assembly, and it has never lost its identity. It had a separate body of laws, both as respects statute and common law, in civil matters. No powers that had been conceded were intended to be taken away by the British-North-America Act of 1867, and none, in fact, were taken away, as it is not the wont of the British government to withdraw constitutional franchises conceded."

" This act, according to my understanding of it distributed powers already existing, to be exercised within their prescribed limits, to different legislatures, constituting one central legislature and several subordinate ones, all upon the same model, without destroying the autonomy of the provinces, or breaking the continuity of the respectives provinces, in a certain sense, the powers of the federal parliament were derived from the provinces subject, of course, the whole being a colonial dependency of the British Crown."

" The provinces of Quebec and Ontario are by the sixth section of the act, declared to be the same that formerly comprised Upper and Lower-Canada. This recognises their previous existence prior to the Union act of 1840. All through the act, these provinces are recognized as having a previous existence and constitutional history upon which the new fabric is based. Their laws remain unchanged, and the constitution is preserved. The offices are the same in name and duties, except as to the office of Lieutenant-Governor, who is placed in the same rela-

tion to the province of Quebec, that the Governor-General sustained to the late province of Canada ; "

" I think it would be a great mistake to ignore the past governmental powers conferred upon and exercised in the province, now called Quebec, in determining the nature and privileges of the legislative assembly of this province. The remark is as common as it is erroneous, that the legislatures of the province are mere large municipal corporations."

" It is true that every government is a corporation, but every municipal corporation is not a government. Consider the powers given exclusively to provincial legislatures. They have sole jurisdiction over education, property and civil rights, the administration of justice and municipal institutions in the province, subjects which affect vitally the welfare of society. The very court which enables us to determine the matter now under consideration holds its existence by the will of the provincial legislature."

" No such powers were ever conferred upon mere municipalities in their ordinary sense. They are subjects which in all nations are entrusted to the highest legislative power. Legislatures make laws. If these legislative powers confided to provincial legislatures are not to be exercised in all their impletude with the incidents attaching to them, they can be exercised by no other sovereign, while our present constitution exists."

J'ajouterai quelques-unes des remarques faites par les membres du conseil privé dans la cause de la Reine et Hodge :

" Il parait à leurs seigneuries que l'objection soulevée par l'appelant est due *à une fausse entente du véritable caractère et de la position des législatures provinciales.* Elles ne sont, en aucun sens, les *délégués qui agissent en aucune manière comme mandataires du parlement impérial.* Quand l'Acte de l'Amérique Britannique du Nord a décrété l'existence de la législature d'Ontario, et qu'il a investi son assemblée législative de l'autorité exclusive de faire

des lois pour la province et pour les fins provinciales, relativement aux matières énumérées dans la section 92, il lui a conféré des pouvoirs qu'elle ne devait *en aucun sens exercer par délégation ou comme agent du parlement impérial*, mais il l'a investie dans le cercle des attributions de cette section, *d'une autorité asusi pleine et aussi ample* que celle que le parlement impérial, agissant dans la plénitude de sa puissance, exercerait lui-même ou pourrait conférer. Dans les limites de sa juridiction et dans la sphère de ses pouvoirs, *la législature loeale est supréme et a la méme autorité que le parlement impérial ou le parlement de la puissance auraient, dans les mémes circonstances pour conférer à une institution municipale ou à un corps de sa création, l'autorité de faire des règlements ou de passer des résolutions relatives aux sujets spécifiés en cette section, ou pour la mettre en opération et en assurer l'effet.*"

Les provinces avaient une autorité souveraine avant l'union, dans les limites de leurs attributions, et cette autorité ne leur a pas été enlevée, et elles ne l'ont pas cédée quant à ce qui concerne leur administration respective.

On a comparé notre constitution à celle des Etats-Unis, et on a remarqué qu'on ne trouve pas dans la nôtre un article analogue à l'article 10 des amendements à la constitution des Etats : " Les pouvoirs non délégués aux Etats-Unis par la constitution, ni prohibés par elle aux Etats, sont réservés aux états respectivement, ou au peuple."

Le pouvoir fédéral dans les Etats-Unis est un pouvoir défini et restreint à la catégorie de sujets spécialement mentionnés dans la constitution. Cependant c'est un gouvernement, et comme on ne voulait pas lui conférer tous les pouvoirs ordinaires d'un gouvernement, mais seulement les pouvoirs déterminés et mentionnés dans la constitution, et qu'on pouvait craindre que la constitution ne fut interprétée, en créant ce gouvernement, comme lui ayant donné tous les pouvoirs d'un gouvernement, et qui

n'étaient pas spécialement mentionnés, on a cru nécessaire d'ajouter cette clause.

Mais dans notre système, les provinces ont voulu créer un gouvernement ayant tous les pouvoirs ordinaires d'un gouvernement, pour les fins de l'union seulement, sans abroger les pouvoirs qui appartenaient auparavant aux provinces, en vertu de leurs constitutions et des lois antérieures, définissant toutefois, pour certains cas mentionnés dans la sections 91, la ligne générale des pouvoirs telle que limitée par la section 92.

Ici nous avons deux gouvernements qui ont des pouvoirs souverains, l'un pour les fins de l'union, l'autre pour l'administration particulière des provinces. Dans les Etats-Unis, il n'y a qu'un gouvernement souverain, celui des Etats, le gouvernement fédéral est limité aux sujets spécialement mentionnés dans la constitution.

On ne pouvait pas mettre dans notre constitution une réserve analogue à celle de l'article 10 des amendements à la constitution des Etats-Unis, parce qu'on ne voulait pas avoir un gouvernement fédéral limité comme celui des Etats-Unis, mais il y a loin de là à dire que l'absence de cette clause prive les provinces de leurs droits pour l'administration provinciale.

La première disposition de la section 91 de l'Acte de l'Amérique Britannique du Nord était suffisante pour organiser le gouvernement fédéral de la Puissance, mais il a été trouvé prudent d'y ajouter les mentions spéciales contenues dans l'autre partie de cette section, et de décréter la section 92, pour tracer et indiquer plus spécialement au gouvernement fédéral et aux provinces la ligne de leurs attributions, et éviter des conflits entre eux.

Les sujets mentionnés spécialement dans les sections 91 et 92 du dit acte, comme devant être soumis exclusivement à l'autorité du gouvernement de la Puissance ou des législatures provinciales respectivement, ne sont pas les seuls sujets sur lesquels l'autorité d'une législature puisse s'exercer, mais ces sujets ont été spécialement mentionnés,

non pour définir strictement les pouvoirs de chaque législature, mais plutôt pour indiquer d'une manière générale la ligne des pouvoirs de chacune.

Par la sous-sectien 3 de la dite section 91, l'autorité législative exclusive du parlement du Canada s'étend au prélèvement de deniers, par tous modes ou systèmes de taxation, pour les fins de l'union, et on ne peut interpréter cette disposition comme enlevant aux provinces le droit de prélever des deniers par taxation pour les fins des provinces, droit qu'on ne pouvait leur enlever, comme susdit, que de leur consentement exprès ; mais pour indiquer d'une manière générale, le pouvoir du parlement fédéral à cet égard, pour les fins de l'union, il a été jugé nécessaire de mentionner plus spécialement ce pouvoir, parce que l'imposition des taxes doit, dans tous les cas, affecter le peuple des provinces, et aussi pour empêcher les provinces de prélever respectivement des deniers par taxation pour les fins de l'union, c'est en ce sens, et en ce sens seulement, que ce pouvoir du parlement fédéral est exclusif ;

La sous-section 2 de la section 92 du dit statut, qui donne aux législatures provinciales le pouvoir exclusif de faire des lois relatives à la taxation directe dans les limites de la province, dans le but de faire un revenu, pour des objets provinciaux, n'a pas été décrétée dans le but de donner aux provinces un pouvoir qu'elles n'avaient pas auparavant, puisqu'elles avaient auparavant le droit d'imposer ces taxes, et que ce droit ne leur a pas été enlevé, pour les fins provinciales, cette disposition n'est pas non plus limitative du droit des provinces, mais, au contraire, elle est insérée dans cette clause, dans le but de limiter le droit du gouvernement de la Puissance, au cas où il aurait prétendu exercer le pouvoir d'imposer une taxe directe dans les limites de la province, dans le but de prélever un revenu pour des objets provinciaux, en vertu de la première partie de la section 91, qui lui donne l'autorité de faire des lois, pour le bon gouvernement du Cana-

da, et de la sous-section 3 de la dite section 91 qui l'autorise à prélever des deniers par tous modes ou systèmes de taxation.

Ce pouvoir donné au parlement fédéral par la sous-section 3 de la dite section 91, de prélever des deniers, par tous modes ou systèmes de taxation, est peut-être le pouvoir accordé aux parlement fédéral qui s'exercera plus immédiatement sur le peuple des provinces, et ces dernières avaient intérêt à le limiter, comme elles l'ont fait, en lui prohibant d'imposer une taxe directe pour des objets provinciaux.

Les provinces n'ont pas renoncé au droit qu'elles avaient avant l'union de 1867, de prélever, dans la province, des impôts directs et indirects, sur les personnes et les propriétés, sauf la restriction quant à la règlementation du trafic et du commerce, et la passation du dit statut de Québec de 1882, chapitre 22, savoir l'acte dont il est question en cette cause, est la meilleure preuve que les représentants du peuple, dans la province de Québec, n'ont pas entendu céder leur droit de prélever des deniers, par taxation, pour faire des revenus à la province, et on doit se conformer à cette intention, pour les droits qui appartenaient exclusivement à l'assemblée législative, suivant la remarque du Conseil Privé dans la cause de Théberge vs. Landry.

Ce statut a été passé par la législature de la province, et il n'a pas été désavoué par le gouvernement fédéral, et l'on peut considérer que ce dernier n'a pas considéré ce statut comme un empiétement sur ses droits.

Le peuple de la province de Québec est seul intéressé dans l'imposition des taxes dans la province, pour faire des revenus à la province, et seul il a le droit de les proposer, comme seul il doit les payer. Le peuple de cette province, en vertu des pouvoirs, sous les anciennes constitutions et sous la nouvelle, peut s'imposer des taxes, et taxer ses propriétés comme il l'entend, sans exiger l'autorité du parlement fédéral, qui n'a aucun intérêt à prohiber

l'imposition des taxes, excepté en autant que ces taxes l'empêcheraient d'exercer quelques-uns des pouvoirs qui lui sont conférés exclusivement par la dite section 91

L'exercice par la province du droit d'imposer la taxe en question ne peut, en aucune matière, préjudicier au droit de la Puissance de prélever des revenus, par tous modes ou systèmes de taxation, pour les besoins du gouvernement de l'union, et cette taxe ne pourrait être inconstitutionnelle que dans le cas où elle porterait atteinte à la règlementation du trafic et du commerce, par le gouvernement de la Puissance.

Les seules restrictions qui paraissent avoir été imposées au droit qu'avaient les provinces de prélever un revenu par tous systèmes de taxation, sont celles qui résultent de la sous-section 2 de la section 91 qui attribue au parlement de la Puissance la règlementation du trafic et du commerce, et de la section 122 qui accorde au parlement du Canada le pouvoir exclusif de modifier les lois de douanes et d'accise ; et il s'en suit que les provinces n'auraient pas le pouvoir de prélever des droits qui seraient considérés comme une règlementation du commerce, ou de modifier les lois de douanes et d'accise, mais à part ces exceptions, elles peuvent imposer et prélever toutes les taxes qu'elles pouvaient prélever avant l'union.

Les dispositions de la section 126 du dit acte d'union de 1867, ne peuvent s'interpréter comme limitant les pouvoirs des législatures, vu que cette disposition n'avait pour objet que d'indiquer l'emploi des revenus existants, soit réservés ou distraits de la cession de tous les revenus faits au gouvernement fédéral, et de ceux spécialement autorisés par cet acte, c'est-à-dire des revenus dont il était question dans cet acte, et d'ailleurs cette clause ne peut avoir pour effet de restreindre les pouvoirs des législatures provinciales, résultant des lois antérieures et de cet acte, vu que cette clause n'a pas été décrétée dans ce bnt.

Après avoir examiné les pouvoirs des législatures provinciales quant aux droits d'imposer des taxes directes et

indirectes, dans les limites de la province, pour les fins provinciales, et sauf les restrictions ci-dessus mentionnées, quant aux lois de douane et d'accise, et avoir constaté leur autorité, nous allons examiner les autres questions soulevées dans ce litige.

TROISIÈMEMENT

Les taxes imposées par le statut de Quebec de 1882, 45, *V. ch.* 22, *sont-elles des taxes directes ?*

Voici ce que nous lisons dans Foucart, *Eléments de droit public et administratif*, 2e édition, N° 884 :

" Parmi les contributions, il y en a qui reçoivent le nom de *contributions directes*, parcequ'elles frappent directement sur les biens ou sur les personnes, au moyen d'un rôle nominatif."

" D'autres, que l'on qualifie d'*indirectes*, parceque, portant d'abord sur des objets de consommation, elles ne sont payées qu'*indirectement* par le consommateur."

Au N° 85, Foucart classe la *contribution des patentes* dans la catégorie des taxes directes, et tous les auteurs considèrent cette contribution comme des taxes directes.

La loi sur la contribution des patentes fut codifiée en France par la loi du 14 juillet 1880 ; et, par l'article 31 de cette loi, on voit que les formnles des patentes sont expédiées par les directeurs des contributions directes.

Voici ce que nous lisons dans Dalloz, *Repertoire*, au mot " *Patente* " N° 1 : " C'est un impôt qui a pour but de faire contribuer aux charges publiques les industries de toute nature, commerciales ou non, en prélevant une proportion déterminée par la loi sur les revenus et produits présumés de cette industrie."

" L'industrie, dans l'acceptation la plus large de ce mot, se distingue, comme élément de la fortune privée, des immeubles et des capitaux mobiliers ; il était donc juste de la frapper d'une contribution spéciale. On a créé pour atteindre ce but, un impôt consistant en une redevance annuelle, qui s'acquitte, suivant le taux déterminé par la

loi, comme prix d'un acte dont chacun est tenu de se munir, pour avoir le libre exercice de sa profession (voir aussi M. Dufour, t. 2, nº 991). Le mot "*patente*" sert aussi à désigner l'acte ou le titre qui est remis au patentable, par le représentant de l'administration des contributions directes (percepteur)."

Voici ce que nous lisons dans Dufour, volume 4; *Traité du droit administratif*, 3e édition, page 362 :

" Dans l'origine, le prix des patentes se réglait à raison du prix du loyer ou de la valeur locale de l'habitation, des boutiques, magasins et ateliers occupés par les patentables (voy. l. 2, 17 mars 1791, art. 12). On était parti de l'idée que l'importance des capitaux engagés et des profits qu'on en retire se manifeste par l'étendue, la beauté et le prix du logement affecté à l'entreprise ou occupé par l'entrepreneur."

" Plus tard, on reconnut que cette base manquait d'exactitude, parce que certaines professions très lucratives s'exercent dans des locaux peu considérables. Pour remédier à cet inconvénient, le législateur entreprit de classer les diverses industries, et régla le prix des patentes, en raison de leur importance relative combinée avec la population de la ville où elles s'exerçaient. (Voy. L. 4 Therm. an III.) Mais, dès l'année suivante, il fallut renoncer à ce système, dans lequel il n'était tenu aucun compte de l'étendue des opérations et de l'inégalité des bénéfices entre ceux de la même profession, dans une même commune. On imagina alors de diviser le droit de patente en deux parties, l'une formant le droit fixe, devait être réglée, en raison de l'importance de l'industrie, combinée, pour certaines professions, avec la population, l'autre, sous la qualification de *droit proportionnel*, devait être déterminée d'après le loyer des maisons d'habitation, usines, ateliers, magasins et boutiques. (Voy. L. 6 fruc, an IV), pris comme signe indicateur de l'étendue des opérations et de l'importance des bénéfices réalisés. On envisageait ainsi la position du contribuable sous divers

points de vue ; on considérait d'abord la nature de la profession, on avait ensuite égard à la population du lieu où elle s'exerçait, lorsque cette condition était susceptible d'influer sensiblement sur ses produits ; enfin, on s'attachait à la réalité de ces produits mêmes, que l'on saisissait dans leur manifestation la plus ordinaire."

" Ce mode d'imposition devait amener dans la contribution une égalité dont on avait jusque là été réduit à déplorer l'absence; tel fut, sous ce rapport, son avantage, qu'il n'a pas été dépassé depuis, et que ses bases sont encore celles sur lesquelles repose la législation actuellement en vigueur."

" L'industrie est une source de revenus, il est juste qu'elle contribue, comme la propriété foncière et la propriété mobilière, aux charges de l'état. La loi 2 du 17 mars 1791 a remplacé en France, les anciens droits de la maîtrise et de jurande, par un droit de patente exigé dans toute l'étendue de l'empire, de ceux français ou étrangers, qui exercent un commerce, un métier, une industrie ou une profession quelconque (2 Foucart, N° 923.)"

" La contribution des patentes est un impot de quotité qui se compose d'un droit fixe et d'un droit proportionnel. Le droit fixe est, tantôt eu égard à la population et d'après un tarif général, tantôt eu égard à la population, mais d'après un tarif exceptionnel pour les industries les plus importantes ; tantôt sans égard à la population."

" Le droit proportionnel est fixé, en général, au vingtième de la valeur locative, tant de la maison d'habitation que des magasins, boutiques etc., suivant l'exercice des professions imposables. Le droit proportionnel, pour les usines et les établissements industriels, est calculé sur la valeur locative de ces établissements pris dans leur ensemble, et de tous les moyens matériels de production (Foucart, No 923).

Cette contribution des patentes me paraît tout-à-fait analogue à la taxe qui est imposée par le statut dont il

est question en cette cause, et, si, en France, la contribution des patentes est une taxe directe, pourquoi serait-elle une taxe indirecte dans la province de Québec? Il est vrai que, dans la province de Québec, on n'a pas le droit de défendre l'exercice de l'industrie déterminée, si la contribution n'est pas payée, comme on le fait en France, et la loi ne défend pas non plus cette exercice. Tout l'effet de la loi en question est de créer une obligation de la part de la compagnie envers le gouvernement de Québec, qui pourra la recouvrer par tous les moyens ordinaires.

On a cité beaucoup d'autorités américaines, sur la classification des contributions, en contributions directes et contributions indirectes, et l'on prétend que, d'après ces autorités, la taxe dont il est question en cette cause est une contribution indirecte.

Je crois que les autorités qu'on a citées ne donnent pas une idée juste de ce que les économistes appellent taxe directe et taxe indirecte, parceque, dans les Etats-Unis, on a donné aux mots *contribution directe* un sens particulier qu'il n'a pas ailleurs; c'est ce que dit Cooley, *on taxation*, page 5.

" The term " direct taxes " is employed in a peculiar " sense in the federal constitution, in the provision requi- " ring such taxes to be apportioned according to represen- " tation, and they are perhaps limited to capitation and " land taxes."

Il faut donc chercher ailleurs la solution de la question.

Le statut dit: Toute compagnie incorporée faisant quelqu'entreprise, commerce ou affaires dans cette province, payera annuellement une somme de $100, avec une somme additionnelle de $50, pour chaque $250,000, ou fraction de $250,000, du capital versé de la compagnie au-dessus de $250,000, et une taxe additionnelle de $50, pour chaque place d'affaires, manufacture ou atelier dans les cités de Montréal et de Québec, et de $20, pour chaque place d'affaires, fabrique ou atelier dans tout autre endroit. La taxe

est imposée sur la compagnie, mais le montant en est déterminé par le montant du capital et l'importance de la localité où la compagnie fait des affaires.

Comme on le voit, cette taxe n'est imposée que sur les compagnies incorporées qui font des affaires dans les limites de la province de Québec, et qui y ont des bureaux Les compagnies incorporées qui font des affaires dans d'autres parties de la puissance du Canada, mais qui n'en font pas dans la province de Québec, ne sont pas soumies à cette taxe.

On a prétendu, dans les Etats-Unis, qu'une taxe imposée sur une compagnie incorporée ou sur une banque, en proportion du capital de cette compagnie, n'était pas une taxe sur la propriété; mais une taxe sur la franchise de la compagnie, ou le privilège qui lui est accordé de transiger des affaires.

Une taxe sur le droit corporatif est dit-on une taxe indirecte.

L'un des éléments, dit Burroughs, par lesquels on distingue une taxe sur la franchise d'une taxe sur la propriété, est qu'une taxe sur la propriété n'est imposée que sur une évaluation qui est la base de la répartition. Elle est établie par des évaluateurs, à l'endroit où est située la propriété, ou à la résidence du propriétaire, tandis que la taxe sur la franchise est imposée directement par la législature, n'est pas établie par les évaluateurs et le montant dépend du montant d'affaires transigées par les corporations.

On prétend qu'une taxe sur une corporation est une taxe indirecte, parce que c'est le public qui en définitive paye.

" A tax on a corporate franchise, dit Cooley, may, or " may not be just or politic. If the business is one of " which corporations have a monopoly, a tax on their " franchise, however heavy, would not be burdensome, " because the result would only be to add to them the " costs of whatever the corporations supplied to the

" public, so *that the tax* would really be paid by the com-
" munity at large."

Je ne vois pas comment on peut dire que c'est le public qui en définitive paye. Les compagnies incorporées sont dans la même position que les individus. C'est tellement le cas que le § 11 de l'article 17 du Code Civil dit que le mot *personne*, comprend les corps politiques et incorporés. Si la législature de Québec eût imposé une taxe sur une personne faisant les affaires que fait la défenderesse, il eût bien fallu que cette personne aurait été obligée, si ses revenus ordinaires n'étaient pas suffisants, d'élever ses prix, dans le cours de ses affaires, et, pour se soutenir, de faire payer au public la taxe que le gouvernement en aurait exigée. Quelle est la différence entre une compagnie incorporée et une personne ordinaire ? Je n'en vois point, et je ne puis saisir la subtile distinction que quelques auteurs en ont faite.

Je considère que la taxe en question est une taxe directe. Elle est aussi directe que si la législature de Québec eût imposé une taxe déterminée sur tous les avocats ou les notaires, car, dans notre droit, les compagnies incorporées sont considérées comme des personnes.

QUATRIÈMEMENT.

L'imposition de ces taxes est-elle nulle parce qu'elles ne sont pas imposées sur toutes les classes de la population ?

Comme on vient de le voir, l'industrie et le commerce sont des sources de revenus, et il est juste qu'ils contribuent comme la propriété foncière aux charges de l'Etat. La propriété foncière peut être taxée par la législature, et elle l'est déjà, pour le soutien des institutions municipales.

Je ne vois rien qui oblige la législature à imposer les mêmes contributions sur toutes les classes de la population. Elle a le droit de les répartir comme elle le juge à propos, et suivant les moyens de ceux qui doivent les payer. C'est ce que l'on fait dans les autres pays, et si la

législature de Québec a le droit d'imposer ces contributions, elle occupe la même position que l'autorité législative dans les autres pays.

CINQUIÈMEMENT.

L'imposition de ces taxes est-elle nulle parce qu'elles sont imposées sur des corporations commerciales, et non sur la propriété ?

La réponse à cette question se trouve dans les remarques que j'ai déjà faites.

SIXIÈMEMENT.

Ces taxes sont-elles une règlementation du trafic et du commerce, sur laquelle le parlement du Canada a l'autorité législative exclusive par le § 2 de la s. 91 de "l'Acte de l'Amérique Britannique du Nord ?"

Les taxes imposées par ce statut ne constituent pas une règlementation du commerce, dans le sens de l'Acte de l'Amérique Britannique du Nord, 1867, et ne constituent pas une prohibition de l'exercice de la branche de commerce faite par la défenderesse.

En examinant l'Acte de l'Amérique Britannique du Nord, 1867, il me parait évident que la règlementation du commerce, que les provinces ont attribué au gouvernement fédéral, est absolument analogue à la réserve que le parment impérial avait faite aux droits qu'il avait accordés aux provinces, dans les statuts de 1791 et 1840. Le gouvernement impérial s'était réservé le pouvoir d'imposer des droits pour la réglementation du commerce. On entendait que ces droits étaient ceux d'importation et d'exportation, et je crois que la réglementation du commerce attribuée au parlement fédéral ne doit s'entendre que des droits de douanes. Si l'on devait donner au mot " la règlementation du commerce " la signification que lui donne la défenderesse, il s'ensuivrait que ceux qui font le commerce dans la province de Québec seraient exempts de toutes contributions pour le support du gouvernement

provincial, mais je crois que le parlement impérial n'a pas interprété ces expressions de la même manière que les interprète la défenderesse, puisqu'il a considéré qu'il était nécessaire d'ajouter, dans la section 122, que les lois d'accises pourraient être modifiées par le parlement du Canada.

Mais on dit : En taxant ces corporations commerciales vous portez atteinte à la liberté du commerce, en les gênant dans leurs opérations.

Si la province a le droit d'imposer cette taxe, comme nous venons de le voir, du moment qu'elle exerce ce pouvoir de bonne foi dans les limites de ses attributions, sa loi est constitutionnelle, même si elle porte atteinte en quelque manière, à la liberté de l'industrie, si cette atteinte n'est qu'un incident nécessaire à l'exercice du droit de la province.

En France, on reconnait la liberté du commerce et de l'industrie ; mais on a accordé aux Communes le droit de faire des règlements sur la salubrité publique. Certaines communes ont passé des règlements prohibant, dans les limites de la commune, la viande d'animaux qui n'auraient pas été abattus aux abattoirs publics, approuvés par l'autorité communale. On a contesté ces règlements, prétendant qu'ils portaient atteinte à la liberté du commerce et de l'industrie, et les tribunaux ont décidé que, quoiqu'en effet, cette décision de l'autorité communale portait en quelque sorte atteinte à la liberté du commerce et de l'industrie, cependant cette atteinte n'était pas suffisante pour empêcher l'autorité communale d'exercer les pouvoirs qui lui étaient accordés, cette atteinte n'étant qu'un incident nécessaire à l'exercice de ce pouvoir. (Voyez Cour de Cassation, 24 juin 1865, Journal du Palais de 1865, page 1096 ; Cour de Cassation, 17 novembre 1865, Journal du Palais de 1865, page 673.)

Il y a une grande différence entre la taxation dont il est question en cette cause, et celle par laquelle la législature aurait dit " pour pouvoir faire des affaires dans la provin-

ce, les compagnies incorporées devront prendre une licence, et payer tant pour cent sur leur capital respectif, et tant sur leur bureau d'affaires " ; et l'effet en est bien différent. Si la législature eût imposé une licence comme conditition de l'établissement d'un bureau dans la province de Québec, elle aurait empiété sur les droits de la législature fédérale, en prohibant conditionnellement ces compagnies incorporées ; mais en leur imposant une taxe, elle ne touche en aucune manière et n'affecte pas la corporation, mais elle lui impose l'obligation de payer sa quote-part des taxes nécessaires au soutien du gouvernement.

On dit que la compagnie incorporée, comme être moral ou personne légale, ne réside pas dans la province de Québec. Je ne puis pas admettre cette proposition, au point de vue qui nous occupe, la compagnie incorporée vient dans la province de Québec puisqu'elle y fait des affaires. Elle y réclame la protection des lois, et pourquoi ne pourrait elle pas être assujettie à payer sa quote-part des dépenses incidentes à la protection de ces lois.

Tout ce que la législature a fait, c'est d'imposer à la défenderesse l'obligation de payer une certaine somme pour subvenir aux dépenses du gouvernement. Si le gouvernement de la province de Québec peut atteindre la défenderesse dans la province, et la forcer par les voies judiciaires à payer le montant de l'impôt, il s'ensuit que la compagnie ou corporation se trouve dans la province puisqu'on peut l'atteindre. Bien loin de toucher à la franchise ou à la corporation, l'acte de la province de Québec suppose la volonté de maintenir son existence, puisqu'elle veut la forcer à exécuter " une obligation qu'elle lui impose."

SEPTIÈMEMENT.

Le fait que la défenderesse, qui fait des affaires en cette province, a été incorporée et que les actionnaires résident tous dans l'Etat de New-York, est-il suffisant pour la soustraire à l'imposition de cette taxe ?

L'autorité souveraine, dans un pays, a le droit d'imposer aux étrangers qui y viennent, ou qui font des affaires dans ce pays, les mêmes contributions qu'elle impose à ses propres citoyens.

Autrement, ce serait donner un avantage aux étrangers ; et cet avantage ne peut être accordé aux étrangers que par un traité.

CONCLUSION.

Je suis donc d'opinion que le statut en question a été passé par la législatre de Québec, tel que constituée par l'Acte de l'Amérique Britannique du Nord, 1867 ; que ce statut était de la compétence de la législature de Québec, et que les taxes imposées par icelui tombent dans la catégorie de taxes que la législature de Québec avait le droit d'imposer ; que les taxes imposées par ce statut sont des taxes directes ; que l'imposition de ces taxes n'est pas nulle, parcequ'elles ne sont pas imposées sur toutes les classes de la population, et parcequ'elles seraient imposées sur des corporations commerciales, et non sur la propriété ; que ces taxes ne sont pas une règlementation du trafic et du commerce, et que le fait que la défenderesse, qui fait des affaires dans cette province, a été incorporée, et que ses actionnaires résident tous dans l'état de New-York, n'est pas suffisant pour la soustraire à l'imposition de cette taxe.

Les défenses de la défenderesse sont renvoyées, et l'action du demandeur, ès-qualité, est maintenue, avec dépens.

JUGEMENT : Le 7e Mai, 1884.

Présent : L'HONORABLE JUGE MATHIEU.

La Cour, après avoir entendu les parties, par leurs avocats, sur le mérite de la présente cause, examiné la procédure et délibéré ;

Attendu que le Demandeur, ès qualité, réclame, par son action, la somme de deux cent quatre piastres, étant pour la taxe imposée sur la Défenderesse par le statut de Québec, de mil huit cent quatre-vingt-deux, 45 Victoria, Chapitre 22, et allégue, dans sa déclaration, que la Défende resse est un corps politique et incorporé existant dans la Province de Québec, dans le district de Montréal, et qu'elle fait affaires, comme telle compagnie incorporée, et a son principal bureau dans la cité et district de Montréal, dans la division du revenu de Montréal ; que le premier jour de juillet, mil huit cent quatre-vingt-deux, et au temps de la passation du dit Statut, le capital payé de la compagnie Défenderesse était de trois cent mille piastres : que la Défenderesse avait alors et a encore aujourd'hui un bureau et une place d'affaires dans la cité de Montréal ; que le trois juillet mil huit cent quatre-vingt-deux, la Défenderesse est devenu endettée au Demandeur ès-qualité en vertu du dit statut en la somme de cent cinquante piastres, étant pour la taxe principale imposée par le dit statut, et en la somme de cinquante piastres pour la taxe additionnelle imposée comme ayant un bureau ou place d'affaires en la Cité de Montréal ; que l'intérêt, sur a dite somme, depuis le trois juillet mil huit cent quatre-vingt-deux, jusqu'à la date de l'institution de l'action qui a été émanée le huit novembre mil huit cent quatre-vingt-deux, s'élève à quatre piastres, et que les dites sommes réunies forment le montant réclamé de deux cent quatre piastres.

Attendu que la Défenderesse allègue, dans son premier plaidoyer, que l'action du Demandeur ès-qualité ne peut être maintenue, parceque le prétendu statut en vertu duquel le Demandeur ès-qualité poursuit n'est pas un statut de la législature de Québec, que ce statut comporte avoir été passé par Sa Majesté, de l'avis et du consentement de la législature de Québec ; que Sa Majesté n'a aucun pouvoir législatif quelconque soit sur ou de l'avis et du consentement de la Législature de Québec pour passer aucune loi ; que la législature de la province de Qué-

bec a seule le droit et le pouvoir de faire des lois sur les sujets mentionnés dans la section 92 de " l'Acte de l'Amérique Britannique du Nord, 1867," et que ce prétendu statut a été passé en vertu de l'autorité présumée de la dite section 92, et n'a pas été fait ou passé par la Législature de Québec, mais par une personne tout à fait différente ;

Attendu que la dite Défenderesse allègue dans un deuxième plaidoyer que même si ce statut a été passé par la Législature de Québec, ce qu'elle nie, il était et est inconstitutionnel et *ultra vires* en autant qu'il s'applique à la Défenderesse ; que les taxes qui sont imposées par ce statut ne sont pas des taxes directes ; que les dites taxes sont imposées sur certaines classes de la population et ne sont pas imposées sur toutes les classes de la population dans la province de Québec ; que les dites taxes sont prélevées sur des corporations commerciales et non sur la propriété ; qu'elles ne tombent pas dans la catégorie de taxes que la Législature de Québec avait le pouvoir d'imposer ; que les dites taxes sont des règlements du commerce et ne peuvent être imposées de manière à constituer une prohibition de l'exercice de la branche du commerce faite par la défenderesse ; que la défenderesse n'a pas été incorporée et ne tient pas sa charte de l'autorité de la Législature de Québec, et conclut à ce que ce statut soit déclaré inconstitutionnel, nul et *ultra vires*, en autant qu'il s'applique à la Défenderesse, et au renvoi de l'action avec dépens ;

Attendu que le Demandeur, ès-qualité, a répondu au premier plaidoyer de la dite Défenderesse que la loi invoquée par le Demandeur ès-qualité a été passée avec les formalités voulues, et qu'elleest en force ;

Attendu que le dit demandeur, *ès-qualité*, a répondu au deuxième plaidoyer de la dite défenderesse, que la loi sous l'autorité de laquelle la taxe réclamée en cette cause a été imposée est constitutionnelle, et que la législature de la province de Québec avait le droit de passer telle loi qui est en force et oblige la compagnie défenderesse ;

Attendu que le seize octobre dernier, les parties en cette cause ont produit des admissions à l'effet suivant ; que la dite compagnie défenderesse est une compagnie incorporée en vertu des lois de l'Etat de New-York, un des Etats-Unis d'Amérique; que le capital de la dite compagnie est de trois cent mille piastres; que tous les actionnaires résident à New-York, et qu'elle a fait affaires dans la province de Québec, avant et jusqu'au premier juillet mil huit cent quatre-vingt deux ; que la question en cette cause est quant à la constitutionnalité de l'acte 45, Victoria, chapitre 22, en autant qu'il a rapport à la défenderesse, et aussi s'il a été passé par la législature de la province de Québec ; que dans le cas où cet acte serait déclaré *ultra vires* quant à ce qui concerne la défenderesse, ou qu'il serait déclaré n'avoir pas été passé par le corps législatif autorisé à ce faire, l'action du demandeur *ès-qualité* doit être renvoyée, avec une recommandation que les frais de la défenderesse soient payés par le gouvernement de Québec, et qu'au contraire, si le dit statut était déclaré constitutionnel et avoir été passé par le corps législatif autorisé, le demandeur devra obtenir gain de cause pour le montant réclamé avec les dépens ;

Attendu que, par le dit statut de Québec de mil huit cent quatre-vingt-deux, 45 Victoria, chapitre 22, intitulé " Acte pour imposer certaines taxes directes sur certaines corporations commerciales " et qui a été mis en vigueur le jour de sa sanction, il est decrèté qu'afin de pourvoir au besoin du service public de cette province, toute compagnie incorporée faisant quelque entreprise, commerce ou affaires dans cette province paiera annuellement une taxe de cent piastres, avec une somme additionnelle de cinquante piastres pour chaque deux cent cinquante mille piastres, ou fraction de deux cent cinquante mille piastres de capital versé dans la compagnie au-dessus de deux cent cinquante mille piastres, et une taxe additionnelle de cinquante piastres pour chaque place d'affaires, manufacture ou atelier dans la cité de Montréal ou Québec, et que ces

taxes seront payables le premier jour juridique du mois de juillet de chaque année, à l'inspecteur des licences du district de revenus dans lequel la corporation commerciale a son bureau principal, et que la taxe additionnelle est payable annuellement à l'inpecteur des licences du district de revenu dans lequel le bureau, la place d'affaires, la manufacture ou l'atelier pour lequel elle est faite payable est situé, et que cette taxe pourra être recouvré par action portée en son nom au profit de sa Majesté par l'inspecteur des licences du district de revenus dans lequel elle est payable, avec intérêt légal à compter de la date de son échéance, par action intentée soit devant la cour de circuit, soit devant la cour supérieure, selon la compétence de la cour relativement au montant réclamé, et que ces taxes feront partie du fonds consolidé du revenu de la province ;

Considérant qu'il appert à la Gazette Officielle de Québec du vingt-sept mai mil huit cent quatre-vingt deux, publiée par autorité, que Son Honneur le Lieutenant-Gouverneur de la province de Québec s'est rendu le dit jour vingt-sept mai, à la chambre du conseil législatif en la maison du parlement, à Québec, et que là et alors, en présence du dit conseil législatif et de l'assemblée législative, il a sanctionné le dit statut 45 Victoria, chapitre 22, au nom de sa Majesté, sous le titre de " Acte pour imposer certaines taxes directes sur certaines corporations commerciales " ;

Considérant qu'il résulte des dispositions de l'Acte de l'Amérique Britannique du Nord, 1867, que Sa Majesté s'est réservé le gouvernement et le pouvoir exécutifs du Canada et qu'elle exerce ce pouvoir pour le Canada, par l'entremise du Gouverneur-Général qu'elle nomme ;

Considérant qu'en vertu du dit statut la législature de la province de Québec est composée du Lieutenant-Gouverneur, du conseil législatif et de l'assemblée législative, et que le lieutenant-gouverneur est nommé par le gouverneur-général qui agit en sa qualité de gouverneur-général et comme réprésentant de Sa Majesté, dans cette nomination ;

Considérant que cette nomination de lieutenant-gouverneur est faite par Sa Majesté, par l'entremise du gouverneur-général comme susdit, et qu'il s'en suit que le lieutenant-gouverneur est le représentant de Sa Majeste dans la province, et que le statut en question qui a été passé par Sa Majesté, de l'avis et du consentement de la législature de Québec, a été passé par l'autorité compétente ;

Attendu que par la section 12 du chapitre 83 des statuts impériaux de 1774, 14 George III, il est décrété qu'il sera et pourra être loisible à Sa Majesté, ses héritiers et successeurs par un ordre signé de leur main, de l'avis du conseil privé, d'établir et de constituer un conseil pour les affaires de la province de Québec..... lequel conseil ainsi constitué et nommé, ou la majorité d'icelui, aura le pouvoir et autorité de faire des ordonnances pour la police, le bonheur et le bon gouvernement de la dite province, du consentement du gouverneur, ou en son absence, du lieutenant-gouverneur, ou commandant-en-chef ;

Attendu que par la section 1 du chapitre 31 des statuts impériaux de 1791, 31 George III, il est statué qu'autant de l'acte susdit, chapitre 83 des statuts impériaux de 1774, qui a rapport à la nomination d'un conseil pour les affaires de la province de Québec, ou au pouvoir donné par le dit acte, au dit conseil, ou à la majorité des membres de faire des ordonnances pour la paix, le bonheur et le bon gouvernement de la province, sera, et est par le dit acte de 1791, rappelé, et que par la section 2 du dit statut de 1791, il est décrété qu'à l'avenir la province de Québec sera devisée en deux provinces appelées respectivement la province du Haut-Canada et la province du Bas-Canada, et qu'il y aura dans chacune des dites provinces respectivement un conseil législatif et une assemblée, et que dans chacune des dites provinces respectivement, Sa Majesté, ses héritiers et successeurs auront le pouvoir, pendant la continuation du dit Acte de 1791 par, de l'avis et du consentement du conseil législatif et de l'assemblée de telles

provinces, respectivement, de faire des lois pour la tranquilité, le bonheur et le bon gouvernement d'icelles, et que de telles lois qui seraient passées par le conseil législatif et l'assemblée, et qui seraient approuvés par Sa Majesté ou au nom de Sa Majesté, par telle personne que Sa Majesté nommerait, de temps à autre, pour être gouverneur ou lieutenant-gouverneur de telle province, étaient déclarées être valides et obligatoires, à toutes intentions et effets quelconques, dans la province dans laquelle elles auraient été ainsi passées ;

Considérant que par les dispositions ci-dessus en dernier lieu mentionnées, chacune des provinces du Haut-Canada et du Bas-Canada qui constituent maintenant les provinces d'Ontario et de Québec, ont reçu une constitution, et que le gouvernement de la province du Bas-Canada, maintenant la province de Québec, a été composé de Sa Majesté la Reine, représentée par le gouverneur ou le lieutenant-gouverneur, du conseil-législatif et de l'assemblée législative, et qu'en vertu des dites dispositions du dit Acte de 1791, la dite législature de la province du Bas-Canada, maintenant la province de Québec, a, en vertu du droit qui lui fut accordé de faire des lois pour le bon gouvernement de la province, exercé jusqu'à l'union des deux provinces, d'une manière incontestable et incontestée, le pouvoir d'imposer des taxes sur les propriétés et les habitants du Bas-Canada, excepté toutefois les droits imposés pour le règlement du commerce, et que ce droit a même été formellement reconnu, pour toutes les colonies, dans le chapitre 12 des statuts impériaux de 1778, 18 George III ;

Considérant que, par le chapitre 35 des statuts impériaux de 1840, 3 et 4 Victoria, les deux provinces du Haut et du Bas-Canada furent réunies, pour ne former qu'une seule province, pour les fins du gouvernement exécutif et de législation seulement, et qu'il résulte des dispositions de ce statut que pour toutes les autres fins, les deux provinces ont conservé leur existence séparée comme cela appert plus particulièrement aux dispositions de la section 56

qui ne met à la charge du fonds des revenus réunis des provinces, que l'intérêt annuel de la dette, mettant à la charge de l'union le capital de ces dettes ;

Considérant que par la section 2 de ce statut certaines dispositions du dit statut de 1791 sont abrogées, mais que les dispositions qui sont mentionnées plus haut du dit statut de 1791 ne le sont pas ;

Considérant que par la section 3 du dit statut il est décrété que depuis et après la réunion des deux provinces, il y aura dans la province du Canada, un conseil législatif et une assemblée qui devaient être respectivement constitués et composés en la manière prescrite, et que Sa Majesté aurait le pouvoir de faire dans la province du Canada, par, et de l'avis, et du consentement des dits conseils législatifs, et assemblées, des lois pour la paix, le bien-être et le bon gouvernement de la province du Canada, lesquelles lois ne devaient pas être contraires au statut impérial de 1840, ou aux parties de l'acte de 1791 qui ne furent pas abrogées par l'acte de 1840 ;

Considérant que par la section 43 de ce statut, l'acte impérial de 1778, XVIII George III, chapitre 12, est confirmé, et que le parlement impérial renonce de nouveau à imposer aucune taxe dans la province du Canada, sauf les droits pour le règlement du commerce ; et que par la section 56 du dit statut il reconnaît même à la législature de la province le droit d'imposer des taxes ;

Considérant que le pouvoir de faire des lois pour le bon gouvernement d'une province comporte le droit d'imposer des taxes, comme cela résulte évidemment des sections 12 et 13 du chapitre 83 des statuts impériaux de 1774, XIV George III ;

Considérant que bien que le droit de prélever des impôts soit, dans un sens, un des attributs de la souveraineté, cependant, sous la constitution anglaise, ce droit n'appartient pas à la couronne, et un sujet anglais ne peut être contraint de payer aucune autre taxe ou imposition, même pour la défense du royaume ou le maintien du gou-

vernement, que celle qu'il a consentie par lui-même ou par ses représentants en parlement, ce droit résultant des dispositions de la grande Charte, et ayant été formellement reconnu pour les habitants du Royaume-Uni par les statuts 25, Edouard I, chapitres 5 et 6, 34, Edouard I, stat. 4, chapitres 1 et 14, Edouard III, stat. 2, chapitre 1, et pour les colonies par le statut de 1778, 18 George III, chapitre 12, et pour le Canada, plus spécialement par la section 53, et pour les provinces composant le Canada par la section 90 de " l'Acte de l'Amérique Britannique du Nord de 1867 " ;

Considérant qu'il appert au préambule de l'Acte de l'Amérique Britannique du Nord de 1867, que ce sont les provinces qui ont exprimé le désir de contracter une union fédérale, c'est-à-dire une alliance, et que le but de cet acte et son unique but a été de sanctionner cette union et de décréter la constitution du pouvoir législatif de la Puissance, et de définir la nature de son gouvernement exécutif, et que c'est là le seul but de l'acte tel que constaté dans le préambule, et que rien n'indique que le but de cet acte ait été de former une nouvelle constitution pour les provinces ;

Considérant que les législatures provinciales telles qu'elles existaient avant l'union de mil huit cent quarante, et avant l'union de 1867, et aussi depuis cette union, n'étaient et ne sont en aucun sens les délégués et n'agissaient et n'agissent en aucune manière comme mandataires du gouvernement impérial, et que le pouvoir qui leur a été conféré de faire des lois pour la province et pour des fins provinciales, ne devait en aucune manière être exercé par délégation ou comme agent du gouvernement impérial, mais quelles ont été investies dans le cercle de leurs attributions d'une autorité aussi pleine et aussi ample que celle que le parlement impérial, agissant dans la plénitude de sa puissance, exercerait lui-même ou pourrait conférer ;

Considérant que, dans les limites de sa juridiction et

dans la sphère de ses pouvoirs, la législature locale est suprême et a la même autorité que le parlement impérial ou le parlement de la Puissance aurait dans les mêmes circonstances ;

Considérant que par la section 91 du dit acte il a été décrété que le parlement du Canada pourrait faire des lois pour la paix, l'ordre et le bon gouvernement du Canada, relativement à toutes les matières ne tombant pas dans les catégories de sujets par le dit acte exclusivement assignées aux législatures des provinces ;

Considérant que cette disposition n'enlève pas aux législatures des provinces les pouvoirs qu'elles avaient auparavant pour le gouvernement de la province, mais crée seulement un gouvernement pour les besoins généraux de toutes les provinces composant cette union fédérale, en lui interdisant toutefois les sujets, par le dit acte, exclusivement assignés aux législatures des provinces ;

Considérant qu'il faut interprêter dans le même sens la dernière partie du premier alinéa de la dite section 91, et que le mot " exclusive " ne doit pas être interprété littéralement, parce que l'énumération des matières tombant sous l'autorité du parlement du Canada, n'est faite que pour indiquer les pouvoirs généraux de ce parlement, sans exclure dans tous les cas les provinces lorsqu'il s'agit de l'administration provinciale ;

Considérant que la disposition du paragraphe 3 de la dite section 91, qui décrète que l'autorité législative exclusive du parlement du Canada s'étend au prélèvement de deniers par tous modes ou systèmes de taxation ne doit s'entendre que pour le prélèvement de deniers pour les fins de l'union, et pour les besoins généraux des provinces, mais ne doit pas être interprétée comme donnant au parlement du Canada un pouvoir exclusif de prélever des deniers par tous modes ou systèmes de taxation même pour des fins provinciales et locales, et comme privant les provinces du droit qu'elles avaient auparavant de prélever des deniers par tous modes ou systèmes de taxation pour les fins provinciales ;

Considérant que le paragraphe 2 de la section 92 du dit statut qui donne à la législature provinciale le pouvoir exécutif de faire des lois relativement à la taxation directe dans les limites de la province, dans le but de prélever un revenu pour des objets provinciaux, ne doit pas s'interpréter comme donnant à la législature de la province une autorité nouvelle, et qu'elle n'avait pas auparavant, mais que cette disposition n'est mise dans le statut, comme toutes les dispositions de la section 92, que dans le but de limiter les pouvoirs généraux données au parlement du Canada par la section 91 ;

Considérant que le gouvernement provincial avait, avant l'union de 1867, le pouvoir de taxer directement et indirectement les personnes et les propriétés dans la province, pour les fins provinciales, et que ce droit n'a aucunement été modifié par les dispositions du dit Acte de l'Amérique Britannique du Nord de 1867, sauf toutefois en autant que les taxes pourraient être considérées comme une règlementation du trafic et du commerce, et sauf le pouvoir accordé au parlement fédéral par la section 122 du dit acte, lui donnant le pouvoir exclusif de modifier les lois de douane et d'accise ;

Considérant que la législature de cette province avait le droit d'imposer la taxe décrétée par le dit statut de mil huit cent quatre-vingt-deux, sur toutes les personnes faisant affaires dans la province et les compagnies incorporées que la sous-section 11 de l'article 17 du Code Civil assimile aux personnes ;

Considérant d'ailleurs que même en donnant aux sections 91 et 92 de l'acte d'union de 1867 l'interprétation que lui donne la défenderesse en cette cause, savoir, que la législature provinciale n'a le droit de prélever que des taxes directes, la défenderesse ne pourrait se soustraire au paiement de la taxe qui est réclamée d'elle, parce qu'il résulte des dispositions du dit acte d'union de 1867, que le législateur n'a considéré comme taxes indirectes que les taxes qui sont imposées pour la règlementation du

trafic et du commerce, et qu'il a spécialement attribuées au parlement fédéral, et qu'il a considéré toutes les autres taxes qui pourraient être prélevées sur les personnes ou les propriétés, dans les provinces, comme des taxes directes ;

Considérant que parmi les contributions il y en a qui reçoivent le nom de contributions directes, parce qu'elles frappent directement sur les biens ou sur les personnes au moyen d'un rôle nominatif, et d'autres que l'on qualifie d'indirectes, parce que portant d'abord sur des objets de consommation, elles ne sont payées qu'indirectement par le consommateur ;

Considérant que les taxes qui sont imposées par le dit statut ne sont pas des taxes indirectes, mais sont des taxes directes, dans le sens de l'Acte de l'Amérique Britannique du Nord, 1867, et qu'elles sont imposées nominativement sur des corps politiques et incorporés, que le paragraphe 11 de l'article 17 du Code Civil du Bas-Canada assimile aux personnes ;

Cansidérant que les taxes imposées par le dit statut, 45 Victoria, chapitre 22, ne sont pas des règlements de commerce, dans le sens de l'Acte de l'Amérique Britannique du Nord, 1867, et ne constituent pas une prohibition de l'exercice de la branche de commerce fait par la défenderesse ;

Considérant que la législature de la province de Québec a le droit d'exercer tous les pouvoirs qui lui appartiennent, et que les atteintes qui résulteraient nécessairement à la liberté du commerce et de l'industrie, par l'exercice de ces pouvoirs, ne peuvent être invoquées pour arrêter cette législature dans l'exercice de ses pouvoirs ;

Considérant que la législature de la province de Québec pouvait imposer les taxes mentionnées au dit statut, 45 Victoria, chapitre 22, sur les corporations et compagnies commerciales qui y sont mentionnées, sans qu'elle fut obligée d'imposer la même taxe sur toutes les classes de la population de la province, et que la législature peut

répartir les impôts sur la population comme elle l'entend ;

Considérant d'ailleurs que l'industrie et le commerce sont une source de revenus, et que, comme élément de la fortune privée, ils se distinguent des biens meubles et immeubles, et qu'il est juste qu'ils contribuent, comme la propriété foncière, aux charges de l'état et aux frais du gouvernement de la province ;

Considérant que l'impôt qui est réclamé de la défenderesse et qui est imposé sur les corporations commerciales mentionnées dans le dit statut de Québec de 1882, a pour but de faire contribuer aux charges publiques les industries commerciales de toute nature, en prélevant une proportion déterminée par la loi, sur les revenus et produits présumés de ses industries ;

Considérant que la taxe dont il est question en cette cause a été imposée dans les limites de cette province, et que la présence de la défenderesse dans cette province est suffisamment constatée par le fait qu'elle plaide à l'action du demandeur en cette cause ;

Considérant que les défenses de la dite défenderesse sont mal fondées, et que l'action du dit demandeur *ès-qualité* est bien fondée ;

A renvoyé et renvoie les défenses de la dite défenderesse, et a maintenu et maintient l'action du dit demandeur *ès-qualité ;* et a condamné et condamne la dite défenderesse à payer au demandeur *ès-qualité* la dite somme de deux cent quatre piastres, avec intérêt sur cette somme, à compter du vingt-trois novembre mil huit cent quatre-vingt-deux, date de la signification du bref de sommation et de la déclaration en cette cause, et avec dépens, distraits à MM. Lacoste, Globensky, Bisaillon et Brosseau, avocats du demandeur.

MÉMOIRE DE L'APPELANTE.

The question wholly turns upon the constitutionality of the Statute of the Province of Quebec, 45 Vict., C. 22,

intituled " An Act to impose certain direct taxes on certain commercial Corporations," so far as the Appellant is concerned.

It may be said that it is admitted that if the tax is indirect, the Act is unconstitutional.

Three questions then present themselves for consideration.

1o What is the meaning of the words in § 2, Sec. 92 of the B. N. A. Act., 1867. " Direct taxation within the province ? "

2o Is this tax, imposed on the Appellant, direct taxation, within the meaning of the foregoing § 2, Sec. 92, B. N. A. Act, 1867 ?

3o Is the tax in question a regulation of trade and commerce interfering with the powers of the Dominion Parliament, under Sec 91 § 2 of the B. N. A. Act. 1867 ?

1o The meaning of the words " direct taxation " in their primary sense is all species of taxation save indirect taxation.

The definitions generally accepted are, " A direct tax is demanded of the person who it is intended shall pay it. Indirect taxes are demanded from one person in the expectation that he will indemnify himself at the expense of others."

Burroughs, on Taxation, §3.

Marshall, pp. 499-500.

Thompson, Social Science, §192, 189, 190, and p. 195.

Again direct tax is one which affects either persons or property generally, throughout the country. An indirect tax generally affects the consumer of the article alone.

A direct tax bearing upon all the immoveable property in the country or on all the persons therein, cannot be shifted from one to the other, for in society, if each man be taxed per poll, for instance, each person in his transactions with others would in the end pay his poll tax himself.

It is impossible to impose direct taxes on the commercial classes alone, for in the conduct of their business they would so regulate prices as to recoup themselves the amount of their taxes from their customers.

Cooley, p. 392.

Hilard, p. 59.

Brown v. Maryland, 12 Wheat., 436-444.

Marshall on Con., 367.

Mill, Pol., Eco., pp. 496, 497, B. 5, C. 3, §3, p. 591, §6, C. 4, §1, §2, pp. 504, 505.

Take the case of an importer of goods for instance, if in *lieu* of import duties on the goods he imports, he was by law bound to pay an annual tax, say of $50,000, the effect would be the same as if he paid $50,000 in duties, he would so distribute the amount he so had to pay over the goods he imports, adding a proportionate sum to the price of each line of goods as would in the end recoup him for his payment of his $50,000 tax, so that virtually he would, as in the case of import duties, act as collector for the Government and the consumers in the end would pay the duty, thus making the tax as imposed on him an indirect tax.

This argument holds good when any particular class of business is taxed.

Virtually in matters of import, it is the importer who is taxed and obliged to pay the duties in the first instance, the amount which he is obliged to pay, being measured by the duties to which the articles he imports are subject under the custom tariff, those duties are but the standard by which the amount he has to pay is measured.

46 Vict., Chap. 12 s. 42.

The operation of a license to do, and of a tax on business is different, but a licence fee and a tax on business are precisely the same, so far as the indirectness of the tax is concerned, in each case the person who is licensed or is taxed recoups himself to the amount he pays to the Government, by putting an extra charge on the goods he

sells to customers, so that he stands merely in the position of a collector for the Government, and the consumer of the goods he sells pays the licence fee or the taxes as the case may be.

Burroughs, § 85.

But a licence is indirect taxation under s. 92 of the B. N. A. Act, 1867, § 9, inasmuch as special power is thereby given to Provincial Legislatures over certain licences, which grant would be unnecessary if licences were direct taxes. Such legislatures having power by § 2 of the same section to provide for the raising of a revenue by direct taxation.

There can be no doubt that so far as taxation is concerned the Local Legislature under s. 92 has but the power of imposing direct taxation within the Province, in order to raise a revenue for Provincial purposes, under § 2, and of requiring the taking out of licences under § 9.

The tax imposed is not in the nature of a licence fee, it is pretended that it is direct taxation.

As already mentioned a direct tax is one which is paid by the person on whom it is levied without any probability of his shifting his burden on to any of the other members of the community. It is essential in order to maintain such a state of things that all the members of the community should be subject to the same tax, for if a tax be levied merely on a portion of the community, that portion will so enhance the price of his productions or its labor which it virtually exchanges with the other members, as to force them to pay such tax, or a large proportion of it—the tax then is an indirect tax.

The words, "within the Province," would seem to have two distinct meanings attached to them in s. 92, § 2, the one limiting the objects of taxation to those within the Province, and the other, requiring that all the objects of such taxation within the Province should be taxed at one and the same time.

The essential condition of direct taxation is that it shall

be equal and uniform, equality and uniformity are essential in order to prevent each individual taxed from shifting his burthen upon his fellows. The system of licensing is the only tax on occupations wherein heavier burthens are inflicted than those exacted from the rest of the community, and they are justified in some instances by the necessity of police supervision (such as saloon &c. licenses,) and in others by the conferring of an exclusive privilege.

But in all other cases where a tax is imposed merely on certain members of a class carrying on any business or occupation, it ceases to be a tax and is extortion.

Burroughs, § 26.

Cooley, p. 129.

Mill, B. 5, Chap. 3, § 2, p. 496.

The power to tax directly can only be exercised by the Local Legislatures on the objects over which the Local Legislatures have exclusive jurisdiction, the intention was solely to empower them to tax directly the objects included in the list of objects over which they are declared to have such exclusive legislative power. It was not intended by § 2, to increase the number of subjects submitted to that power, but merely to enable them out of those subjects to raise a revenue by direct taxation.

MÉMOIRE DE M. W. B. LAMBE, *ès-qualité*, en appel :

On prétend que l'acte est inconstitutionel.

1o Parce que le statut comporte avoir été passé par Sa Majesté de l'avis et du consentement du conseil législatif et de l'assemblée législative de la province de Québec, tandis que cette législature est composée du lieutenant-gouverneur, du conseil législatif et de l'assemblée législative ;

2o Parceque l'acte a été sanctionnée au nom de Sa Majesté, tandis qu'il aurait dû l'être au nom du Lieutenant gouverneur ;

3o Parceque la législature de Québec n'a que les pouvoirs qui lui sont assignés par la section 92 de l'Acte de

l'Amérique Britannique du Nord et que le droit d'imposer une taxe de la nature de celle en question, n'est pas inclu dans les pouvoirs conférés à la province par cette section ;

4o Parceque la taxe imposée est une taxe indirecte et que la législature de la province n'a pas le droit d'imposer de taxe indirecte ;

5o Parceque la taxe ne s'étend qu'à une classe particulière et non à toutes les classes du peuple de la province ;

6o Parceque la taxe est une réglementation du commerce.

7o Parceque la taxe constitue un empiètement sur le droit que les compagnies ont, par leur acte d'incorporation, de faire des affaires dans la province de Québec ;

8o Parce qu'une taxe imposée par la législature de Québec ne peut affecter des compagnies incorporées par la législature fédérale.

9o Parcequ'une taxe imposée par cette même législature ne peut affecter des compagnies étrangères ;

10o Parceque la taxe ne peut affecter des compagnies dont le capital est à l'étranger et possédé par des étrangers.

Nous espérons pouvoir établir :

1o Que le Conseil Législatif de la Province de Québec a tous les pouvoirs dont le Bas-Canada était investi, lors de la confédération et avant l'Union, moins ceux dont il s'est dénanti en faveur du pouvoir fédéral ;

2o Que le Bas-Canada ne s'est pas dénanti du pouvoir d'imposer, dans la province, une taxe même indirecte pour des fins provinciales ;

3o Que la taxe imposée est une taxe directe ;

4o Qu'elle n'est pas un empiétement sur le pouvoir fédéral de réglementer le commerce ;

5o Qu'elle ne constitue pas un empiétement sur le droit corporatif des compagnies de faire des affaires dans la province de Québec.

6o Que la législature a le droit d'imposer une taxe sur toute compagnie soit étrangère, soit fédérale, soit locale faisant affaire dans la province de Québec.

Nous référons aux remarques des honorables juges Jetté et Mathieu, dans les causes qu'ils ont jugées. Elles nous dispensent d'une dissertation dans ce mémoire.

Le jugement du juge Mathieu a été confirmé par la Cour d'Appel, les juges Dorion et Cross, dissidents. Le jugement de la Cour d'Appel ne contient pas de motifs.

Voici les remarques du juge Jetté dans la cause de *William B. Lambe*, ès-qualité, vs. *The North British and Mercantile Insurance Company*, qu'il a jugée le 23 mai 1884.

En 1882, la Législature de cette province a décrété, " dans le but de pourvoir aux besoins du service public," l'imposition de certaines taxes sur les banques, les compagnies d'assurance, de télégraphe, de chemin de fer, etc., etc. La loi votée à cette fin est intitulée : " *Acte pour imposer certaines taxes directes sur certaines corporations commerciales*," (41 Vic. : chap. 22 ;) et ses principales dispositions, en autant qu'elles affectent les causes maintenant soumises à ce tribunal, peuvent se résumer comme suit :

L'article 1er de cette loi déclare que toute compagnie d'assurance acceptant des risques, et faisant des affaires d'assurance en cette province, paiera annuellement les diverses taxes mentionnées en l'article 3.

L'article 2 soumet à l'impôt, les compagnies d'assurance sur la vie, contre le feu, contre les risques de la navigation, sur les eaux intérieures et sur la mer, de garantie, et contre les accidents ; mais en excepte les compagnies d'assurance mutuelle, organisées en vertu des lois de cette province.

L'article 3 répartit l'impôt comme suit :

Une compagnie d'assurance sur la vie seulement..$500 00
Toute autre compagnie d'assurance n'ayant qu'une seule branche d'affaires 400 00
Pour chaque branche d'affaires en sus, y compris

l'assurance sur la vie..... 50 00
Pour chaque bureau, à Montréal et à Québec..... 100 00
Pour chaque bureau dans toute autre localité..... 5 00

Enfin, par les articles 4, 5 et 6, il est statué que cet impôt sera payable le premier jour juridique du mois de juillet, de chaque année, à l'inspecteur des licences du district de revenu dans lequel la compagnie a son bureau principal, et si elle n'a pas tel bureau principal dans la province, alors à l'inspecteur du district de revenu de Québec ; et ces fonctionnaires sont autorisés à poursuivre, en leur nom, le recouvrement de toute somme exigible en vertu de cette loi.

La défenderesse, qui est une compagnie d'assurance contre le feu et sur la vie et qui a un bureau d'affaires à Montréal, tombe donc sous l'effet de cette loi, et le demandeur, inspecteur des licences du revenu de ce district, lui réclame sa proportion de cette taxe s'élevant à une somme totale de $550.

La compagnie défenderesse a plaidé à cette demande par deux exceptions :

Par la 1re, elle soutient que la loi invoquée n'a aucune existence légale et doit être considérée comme non avenue, attendu qu'elle a été passée au nom de Sa Majesté la Reine, qui ne fait pas partie de la Législature de Québec et n'a aucun pouvoir législatif en cette province.

Par sa 2e exception, la défenderesse affirme que si cette loi a une existence légale quelconque, elle est inconstitutionnelle et ne peut affecter cette compagnie, pour diverses raisons que nous résumons comme suit :

1o et 7o Parceque cette compagnie n'a pas été incorporée par la Législature provinciale, qu'elle est dûment licenciée pour exercer ses droits comme compagnie d'assurance par le gouvernement fédéral, en vertu des statuts fédéraux de 1875 et 1877 relatifs aux assurances.

2o Parceque la taxe réclamée n'est pas directe ;

3o, 4o, 5o Parceque cette taxe n'est imposée qu'à cer-

taines classes de la population ; qu'elle ne frappe que les corporations commerciales et non les biens ; et qu'elle ne tombe dans aucune des catégories d'impôts que la Législature a le droit de décréter ;

6° Parceque cette taxe constitue une réglementation de commerce ;

8° Enfin, parceque cette taxe est de la nature d'une licence.

Afin de présenter avec plus de concision les questions que soulève réellement ce litige, j'élague de suite la prétention soulevée par la première exception de la défenderesse, que la loi invoquée n'a pas d'existence parce qu'elle a été passée au nom de Sa Majesté, qui n'a aucun pouvoir législatif en cette province. M. le juge Papineau, dans la cause de *Molson vs. Chapleau*, rapportée au 5e vol. de la Thémis, p. 75, a fait justice de cette prétention, avec une vigueur de raisonnement qui me dispense de rien ajouter à ce que mon honorable collègue a dit en cette circonstance. Je me contenterai de référer en outre à l'ouvrage de Todd, *on Parliamentary government in the British Colonies*, pp. 329, 369, 392, 394 et 398,—où la fausseté de cette prétention est aussi clairement établie.

Arrivant aux questions soulevées par la deuxième exception de la défenderesse, je les réduits à deux principales sur lesquelles les avocats des parties ont surtout insisté et qui absorbent virtuellement toutes les autres, savoir :—

1° La taxe réclamée est-elle une taxe directe ou indirecte ?

2° Si c'est une taxe directe, constitue-t elle une réglementation du commerce ?

C'est à la lumière des articles 91 et 92, de l'acte constitutionnel de 1867, que ces questions doivent être étudiées, et elles ne sauraient être sainement résolues qu'en déterminant le sens et la portée exacte de ces deux dispositions du statut impérial. Cette étude, qui s'impose ainsi à ce tribunal, constituerait en toute circonstance une tâche

fort difficile, mais cette tâche devient bien autrement délicate et ardue, en présence des opinions si diverses exprimées par le nombre considérable de magistrats éminents et de jurisconsultes distingués qui ont déjà eu à apprécier ces mêmes dispositions. Aussi ne suis-je pas tenté d'agrandir le domaine que j'ai à parcourir et tout m'invite, au contraire, à suivre le sage conseil que nous donnent les lords du conseil privé, dans la cause de *Parsons vs. The Citizens Insurance Company*, lorsque, parlant du devoir imposé aux tribunaux d'interpréter ces deux clauses de notre acte constitutionnel et d'en harmoniser les dispositions, ils ajoutent : " In performing this difficult duty, " it will be a wise course for those on whom it is thrown " to decide each case which arises as best they can, with- " out entering more largely upon an interpretation of the " statute than is necessary for the decision of the parti- " cular question in hand."

C'est donc dans ces strictes limites que j'apprécierai les questions soulevées dans les causes qui me sont maintenant soumises.

1° La taxe réclamée est-elle *directe* ou *indirecte* ?

On a souvent invoqué, sur ce premier point, la jurisprudence des tribunaux des Etats-Unis comme fixant et déterminant le sens de ces mots *taxe directe*. Malgré le respect que doivent inspirer partout ces décisions remarquables, nous n'hésitons cependant pas à dire qu'elles sont absolument inapplicables à notre état de choses. Comment, en effet, pourrions-nous accepter cette règle d'interprétation de notre constitution, cette jurisprudence interprétative de la constitution américaine, lorsqu'il suffit de mettre en regard les dispositions respectives des deux pactes constitutionnels, au sujet de cette taxe directe, pour en faire ressortir les différences essentielles ?

L'art. 92, du Statut Impérial de 1867, dit purement et simplement que les provinces de la Confédération canadienne ont le droit de prélever un revenu par la taxe

directe ; et ce, sans restrictions, sans limitation, dans le sens absolument de ces mots : *taxe directe.*

Au contraire, si nous référons à la constitution des Etats-Unis, loin d'y trouver une disposition aussi simple et aussi claire, nous constatons que la taxe directe n'y peut être établie, par le gouvernement fédéral, qu'en la répartissant entre les divers Etats, d'après le nombre respectif de leurs habitants ; et que ce nombre doit être déterminé en ajoutant au nombre total des personnes libres, "y compris ceux servant pour un temps limité et " non compris les Indiens non taxés, *trois cinquièmes de* " *toutes autres personnes.*" Art. 1er, sec. 2, § 3, et sec. 9 § 4.

Or, quel est le sens de cette disposition ? C'est un fait reconnu que l'on a voulu, par là, garantir les Etats du Sud, qui avaient une nombreuse population esclave, contre l'injustice d'une capitation qui, imposée dans des conditions d'uniformité, aurait pesé sur la population blanche de ces états dans des proportions iniques. Et pour y arriver, on a cru devoir affranchir d'une telle taxe les $\frac{3}{5}$ de la population esclave, afin d'équilibrer ainsi le fardeau qui devait peser sur la population blanche de tous les Etats.

Comment, en présence de telles dispositions, les tribunaux américains devaient-ils interpréter ces mots : *taxe directe ?* Evidemment dans le sens restreint qui leur était donné dans le pacte constitutionnel, c'est-à-dire qu'aucune taxe ne devait être considérée comme directe, à moins qu'elle ne fût répartie sur tous les Etats, d'après la population de chacun, et en comptant cette population de la manière sus-indiquée, c'est-à-dire en supprimant les $\frac{3}{5}$ de la population esclave.

Aussi le juge en chef Chase, en arrivait-il à dire, dans la cause de *Venzie Banks* vs. *Fenna* (8 Wallace, p. 553) qu'il ne pouvait y avoir, *d'après la Constitution américaine*, que DEUX *taxes directes :* celle sur les immeubles et la capitation. " It may be rightly affirmed, therefore, that in the " practical construction of the Constitution by Congress,

" direct taxes have been limited to taxes on *land* and " appurtenances, and taxes on polls or Capitation taxes."

Et Cooley—On Taxation, fait à la page 5, note 2, la citation suivante : " The term *direct taxes* is employed *in a* " *peculiar sense* in the federal Constitution, in the provi- " sion requiring such taxes to be apportioned according " to representation, and they are perhaps limited to *Capit-* " *ation* and *land taxes*. Enfin *Kent*, tome 1er, p. 255, dit : " The Constitution contemplated no taxes as direct taxes, " but such as Congress could lay in proportion to the " census."

Il résulte donc clairement des quelques observations qui précèdent, qu'il est impossible de demander à cette jurisprudence américaine établie sous l'empire de dispositions spéciales et exceptionnelles une règle d'interprétation de l'article si différent de notre propre Constitution.

L'art. 92, du Statut de 1867, comme nous l'avons dit, déclare simplement que les provinces pourront prélever un revenu au moyen de la *taxe directe*. Ces mots sont donc employés ici sans conditions, ni restrictions, et dans leur sens propre et absolu. Et pour déterminer ce sens il suffit de recourir aux régles que nous donnent les économistes politiques, règles parfaitement acceptées et reconnues au moment où fut arrêté entre les provinces et sanctionné par la métropole, le pacte constitutionnel que nous avons aujourd'hui à interpréter.

Or, tous les économistes s'entendent pour diviser l'impôt en *direct* et *indirect*. Il est vrai que la même unanimité n'existe pas entre eux lorsqu'il s'agit de donner une définition précise de chacune de ces deux catégories d'impôt et une classification rigoureuse des contributions qui doivent rentrer dans l'une ou dans l'autre de ces catégories. Néanmoins nous trouvons dans les règles générales acceptées par les écrivains les plus en renom, suffisamment d'uniformité et d'harmonie pour en tirer la solution de la question que nous examinons.

M. Leroy-Beaulieu, dans son *Traité de la science des*

Finances, Tome 1er, p. 214, après avoir démontré que la définition des impôts *directs* et *indirects*, donnée par l'administration, dans différents pays, n'est pas toujours exacte, propose la suivante comme étant la plus scientifique et la plus satisfaisante qu'il ait pu trouver :

" Par *l'impôt direct* le législateur se propose d'atteindre " immédiatement du premier bond et proportionnelle- " ment à sa fortune ou à ses revenus, le véritable contri- " buable ; il supprime donc tout intermédiaire entre lui " et le fisc, et il cherche une proportionnalité rigou- " reuse de l'impôt à la fortune ou aux facultés.

" Par *l'impôt indirect* le législateur ne vise pas immé- " diatement le véritable contribuable et ne cherche pas à " lui imposer une charge strictement proportionnelle à " ses facultés : il ne se propose d'atteindre le vrai contri- " buable que par ricochet, par contre-coup, par répercus " sion : il met des intermédiaires entre lui et le fisc, et " renonce à une stricte proportionnalité de l'impôt dans " les cas particuliers, se contentant d'une proportionna- " lité relative en général."

M. Passy, qui a fourni au *Dictionnaire de l'Economie Politique*, publié par MM. Coquelin et Guillaumin, l'article traitant de *l'impôt*, dit aussi :

" C'est un usage reçu de diviser les impôts en deux " catégories distinctes. On appelle *directs* ceux que les " contribuables acquittent eux-mêmes pour leur propre " compte ; on appelle *indirects* ceux dont certains d'entre " eux ne font que l'avance et dont ils obtiennent le rem- " boursement des mains d'autres personnes.

Mill—*Principles of Political Economy*, Livre 5, ch. 3 § 1, nous dit :

" Taxes are either *direct* or *indirect*. A *direct tax* is one " which is demanded from the very persons who, *it is* " *intended or desired* should pay it. *Indirect taxes* are " those which are demanded from one person in the expec- " tation and intention that he shall indemnify himself at " the expense of another : such are the *excise* or *customs*."

Walker—*Science of wealth*, p. 338.

" *A direct tax* is demanded of the person who, it is in-
" tended, shall pay it. *Indirect taxes* are demanded from
" one person, in the expectation that he will indemnify
" himself at the expense of others."

Tel est le système qui est le plus généralement adopté aujourd'hui.

On peut le résumer en peu de mots : C'est de l'incidence de l'impôt que dépend sa classification. Si l'impôt frappe la personne même qui doit le supporter, il est *direct :* si, au contraire, la personne qui paye la taxe doit se récupérer sur d'autres, l'impôt est *indirect.*

Remarquons cependant, avant d'aller plus loin, dans quelles conditions d'élasticité pratique est énoncée cette règle de classification des impôts. Les économistes ne disent pas que l'impôt direct est uniquement celui que le contribuable ne pourra, en aucune façon, recouvrer d'un autre, mais simplement celui au moyen duquel le contribuable est atteint *immédiatement et sans intermédiaire*, dit Leroy-Beaulieu ; " One which is demanded from the very " persons who, *it is intended or desired*, should pay it," dit Mill. Et quand même le contribuable pourrait, en définitive, se récupérer en rejetant l'impôt sur un autre, ceci ne changerait pas la nature de la taxe qui restera toujours ce que la règle acceptée l'a faite, une taxe directe.

Ainsi l'impôt foncier, l'impôt sur la terre est, de l'aveu de tout le monde, et même au point de vue de la jurisprudence américaine, un impôt *direct.* Néanmoins il peut arriver que, si le propriétaire n'occupe pas lui-même son immeuble, il réussisse à rejeter cette taxe sur le locataire

De même les droits de douane doivent nécessairement être rangés dans la classe des impôts *indirects.* Cependant si le consommateur importe lui-même les choses dont il a besoin, il est évident que, pour lui, l'impôt devient *direct* puisqu'il le paie sans intermédiaire.

Néanmoins ni dans l'un, ni dans l'autre cas, pourrait-on prétendre changer la classification acceptée, puisque

ces accidents ne sauraient enlever à l'impôt son caractère véritable, au point de vue de la législation et de l'économie politique.

Cette bâse établie, voyons maintenant comment les économistes procèdent au classement des divers impôts connus, dans chacune de ces deux catégories. Tous ne nous donnent pas sans doute une classification rigoureuse et uniforme, et la raison en est facile à comprendre. Aux Etats-Unis, une règle spéciale et exceptionnelle domine ; en France, en Angleterre et dans les autres pays, on n'a pas encore eu l'idée d'un système où les attributions des pouvoirs publics sont divisés et ensuite limités comme ils le sont dans notre constitution. La nomenclature ne présentait donc aucun intérêt, et il suffisait aux économistes de poser le principe servant à déterminer ce que l'on doit entendre par taxe directe et par taxe indirecte, sans entrer dans l'énumération de celles qui rentrent dans l'une ou dans l'autre de ces deux catégories. Quelques-uns cependant, parmi les économistes français ont fait cette énumération, et bien que les écrivains anglais ne soient pas entrés dans ce détail, comme la base sur laquelle repose la division est acceptée par eux, la classification des économistes français doit être accueillie comme ayant l'autorité de tous les écrivains que nous avons cités.

Passy, dans son article sur l'*impôt* (Dictionnaire d'économie politique,) dit :

" Le nombre des impôts, classés sous le titre D'IMPOTS DIRECTS est assez considérable. Voici : ceux qu'il importe de mentionner :"

" 1o. Impôts sur les personnes ; 2o. sur la terre ; 3o. sur les maisons et constructions ; 4o. sur l'exercice des professions ; 5o. sur les revenus ; 6o. sur les transmissions par voie de succession et de donation ; 7o. sur les transmissions à titre onéreux ; 8o. l'impôt du timbre sur les effets de commerce."

" Les IMPOTS INDIRECTS constituent deux catégories dis-
" tinctes. La première se compose des impôts perçus sur

" les produits même du pays avant le moment où ils arri-
" vent à la consommation et prend le nom d'*excise*; la
" seconde se compose d'impôts perçus aux frontières,
" soit sur les produits étrangers destinés aux marchés
" intérieurs, soit sur les produits nationaux expédiés
" au dehors, et prend le nom de *douanes*."

M. *Leroy-Beaulieu*, 1er. vol. nous donne également, comme *impôts directs*, ceux sur: 1o. les personnes (p. 272); 2o. la terre (p. 288); 3o les maisons et constructions (pp. 301, 336); 4o. l'exercice des professions, (pp. 373, 390, 395, 399); 5o. les loyers, (p. 355); 6o. le revenu, (p. 423.)

Mais il range parmi les contributions *indirectes*, l'impôt sur les successions et celui du timbre, (p. 480).

Ainsi ces deux autorités s'accordent à dire que l'impôt sur l'exercice des professions est un impôt *direct*. Et par impôt sur l'exercice des professions on entend non seulement la taxation des professions liberales, mais encore celle des bénéfices industriels et commerciaux de quelque nature qu'ils soient.

Or, l'impôt que l'on réclame ici de la compagnie défenderesse a évidemment cette portée et ce caractère. L'art. 1er. de la loi déclare: que " toute compagnie d'assurance
" *acceptant des risques et faisant des affaires d'assurance*
" dans cette province..... paiera annuellement les diver-
" ses taxes mentionnées dans l'art. 3."

La taxe réclamée a donc été imposée à raison de l'exercice de la profession, de l'industrie ou du commerce de la compagnie défenderesse. Et comme cet impôt (que l'on appellerait en France: *impôt des patentes*, et aux Etats-Unis: taxe d'affaires, " *business tax* "), est demandé directement aux compagnies taxées, que l'intention du législateur est évidemment d'atteindre ces compagnies du premier bond, immédiatement et sans intermédiaire, nous devons conclure, d'après les règles acceptées par les économistes politiques, que cette taxe est incontestablement, dans le sens de notre constitution, une *taxe directe*.

Car, on ne saurait contester que, pour arriver à une

saine interprétation de notre pacte constitutionnel, nous devons aussi, comme dans l'interprétation des contrats ordinaires, rechercher surtout le sens qui a dû être dans l'intention des représentants des provinces confédérées.

Or, n'est-il pas évident qu'en se servant de ces termes *taxe directe*, sans aucune restriction, ni limitation, les hommes d'état qui ont redigé notre constitution ont entendu leur donner le sens accepté dans tous les pays où l'étude de l'économie politique s'impose à tous ceux qui s'occupent de législation et de gouvernement ?

Sans doute qu'en employant ces termes, qu'en se servant de ces expressions, les rédacteurs de notre constitution ont eu l'intention de restreindre le pouvoir des législatures provinciales et de leur imposer un frein peut-être salutaire pour la protection des administrés. Tous les économistes sont d'accord, en effet, pour reconnaître que le peuple supporte beaucoup plus facilemeut les taxes indirectes que les taxes directes, parce qu'il s'aperçoit à peine des premières, tandis que les secondes sont toujours visibles et surtout sensibles. C'est ce qu'exprimait spirituellement Turgot en disant que la taxe indirecte est le meilleur moyen " *de plumer la dinde sans la faire crier.*"

Et *Mill*, ch. 6, § 1er, exprime la même pensée dans un style plus grave :

" Are direct or indirect taxes the most eligible? This " question, at all times interesting, has of late, excited a " considerable amount of discussion. In England there " is a popular feeling, of old standing, in favour of indi- " rect, or it should rather be said in opposition to direct " taxation. The feeling is not grounded on the merits of " the case, and is of a puerile kind. An Englishman dis- " likes, not so much the payment as the act of paying. " He dislikes seeing the face of the tax collector, and being " subjected to his peremptory demand. Perhaps, too, the " money which he is required to pay directly out of his " pocket is the only taxation which he is quite sure that " he pays at all."

Il est évident pour moi, que les hommes d'état qui ont posé les bases et fixé les termes de notre constitution se rendaient parfaitement compte de ce sentiment populaire exprimé par *Mill*, et qu'ils n'ont pas cru devoir chercher le moyen le plus efficace de contrôler le pouvoir provincial que de le réduire à la taxe directe, persuadés que, l'attention du peuple étant ainsi attirée sur les actes de ses gouvernants, il ne leur permettrait d'imposer que les taxes qu'il croirait devoir supporter.

Mais, d'un autre côté, il me paraît raisonnable aussi de conclure que si c'est là le frein que l'on a cru devoir imposer au pouvoir des législatures provinciales, on doit au moins reconnaître à ce pouvoir toute l'étendue qu'il comporte légitimement et que les principes les moins contestés de l'économie politique permettent de lui donner.

Tout concourt donc à démontrer que la taxe réclamée de la compagnie défenderesse est une *taxe directe*, et que la législature provinciale, dans l'exercice légitime de ses attributions, pouvait légalement imposer.

2o. Cette taxe constitue-t-elle une réglementation du commerce ?

L'art. 91, du statut impérial de 1867 attribue exclusivement au Parlement fédéral le pouvoir de *faire des lois* pour *la réglementation du traffic et du commerce.*

Quelle est la portée de cette disposition ?

Si nous voulions en rechercher l'interprétation dans la jurisprudence Américaine, il nous faudrait encore constater tout d'abord que les dispositions respectives des deux constitutions sur cette matière, ne sont pas identiques. En effet, tandis que l'article de notre statut est pur et simple, celui de la constitution américaine est qualifié. Ainsi le 3e §, de la sec. 8, Art. 1er de la constitution des Etats Unis dit que le congrès aura le pouvoir de régler le commerce : 1o. avec les nations étrangères ; 2o. entre les divers états ; et 3o. avec les tribus indiennes. L'autorité du Congrès est donc formellement déterminée ; aussi les jurisconsultes américains admettent-ils que les Etats ont

le contrôle complet de leur *commerce intérieur;* pourvu, bien entendu, que ce contrôle ne s'exerce pas de manière à se trouver en conflit avec les lois fédérales relatives au commerce général. (Burroughs, on Taxation, p. 104).

Il y a donc, encore ici, une différence assez marquée entre les deux pactes constitutionnels pour que nous n'acceptions pas, sans restrictions, les opinions des jurisconsultes et des économistes américains et la jurisprudence de leurs tribunaux, et pour nous engager à chercher ailleurs le sens particuller de cette disposition de notre propre constitution.

D'ailleurs notre tâche, sur ce point, est singulièrement facilitée par un jugement rendu par le plus haut tribunal de l'Empire, le Conseil Privé ; arrêt qui bien qu'il ne nous donne pas encore une règle absolue et définitive, pour l'interprétation de cet article de notre statut Constitutionnel, nous indique suffisamment la voie, cependant, pour nous permettre de nous aider de son autorité.

Dans la cause de *Parsons* and *The Citizens Insurance Co.* (Cartwright, p. 277) les Lords du Conseil Privé se sont exprimés comme suit : " The words *regulation of trade and* " *commerce,* in their unlimited sense, are sufficiently wide, " if uncontrolled by the context of other parts of the act, " to include every regulation of trade ranging from poli- " tical arrangements in regard to trade with foreign gov- " ernments, requiring the sanction of Parliament, down " to minute rules for regulating particular trades. But a " consideration of the act shows that the words were not " used in this unlimited sense. In the first place the col- " location of No. 2 with classes of subjects of national " and general concern affords an indication that *regula-* " *tions relating to general trade and commerce* were in the " mind of the Legislature when conferring this power on " the Dominion Parliament. If the words had been in- " tended to have the full scope of which, in their literal " meaning, they are susceptible, the specific mention of " several of the other classes of subjects enumerated in

" section 91, would have been unnecessary; as 15, " banking; 17 weights and measures; 18, bills of ex- " change and promissory notes; 19, interest; and even " 21, bankruptcy and insolvency."

" *Regulation of trade and commerce* may have been used " in some such sense as the words *regulations of trade* in " the Act of Union between England and Scotland (6 " Anne ch. II) and as these words have been used in " other Acts of State. Article V of the Act of Union " enacted that all the subjects of the United Kingdom " should have *full freedom and intercourse of trade and* " *navigation* to and from all places in the United Kingdom " and the colonies; and article VI, enacted that all parts " of the United Kingdom, from and after the Union, " should be under the SAME *prohibitions, restrictions, and* " REGULATIONS OF TRADE. Parliament has, at various times, " since the Union, passed laws affecting and regulating " specific trade in one part of the United Kingdom only, " without it being supposed that it thereby infringed the " articles of Union. Thus the acts for regulating the sale " of intoxicating liquors notoriously vary in the two " kingdoms. So with regard to acts relating to bank- " ruptcy, and various other matters.

" Construing therefore the words *regulation of trade and* " *commerce* by the various aids to their interpretation " above suggested, *they would include political arrange-* " *ments in regard to trade requiring the sanction of Parlia-* " *ment, regulation of trade in matters of interprovincial* " *concern, and it may be that they would include general re-* " *gulation of trade affecting the whole Dominion.*

" Their Lordships abstain on the present occasion from " any attempt to define the limits of the Dominion Par- " liament in this direction. It is enough for the decision " of the present case to say that, in their view, its author- " ity to legislate for the regulation of trade and com- " merce does comprehend the power to regulate by legis- " lation the contracts of a particular business or trade,

" such as the business of fire insurance, in a single Pro-
" vince, and therefore that its legislative authority does
" not, in the present case, conflict or compete with the
" power over property and civil rights assigned to the
" legislature of Ontario by No. 3 of section 92."

Résumons et précisons ces observations. Bien que le sens absolu des mots " réglementation du trafic et du commerce," semble attribuer au parlement fédérale une autorité entière et exclusive sur tout ce qui, de près ou de loin, peut rentrer dans un tel sujet, le Conseil Privé n'hésite pas à dire qu'on ne saurait donner une portée aussi étendue à cet article de notre constitution. Et traçant la limite, qui lui paraît avoir été fixée dans l'intention du législateur, le tribunal suprême déclare que la juridiction du pouvoir fédéral s'étend sans doute à cette réglementation du commerce qui est la conséquence des arrangements politiques, à celle relative au commerce interprovincial, et peut-être à la réglementation du commerce, en général, mais qu'elle ne saurait aller plus loin ! En d'autres termes, que toute législation réglementant le commerce à un point de vue *national*, devrais-je dire, est incontestablement du ressort de la législature fédérale, mais que ce serait dépasser le but que de renfermer ensuite les législatures provinciales dans un cercle de fer et de leur interdire toute législation pouvant affecter, même accidentellement, le commerce ou les commerçants !

Où conduirait, en effet, une interprétation différente sinon à l'absorption certaine, inévitable même, de toutes les attributions législatives par l'autorité centrale. Car le commerce c'est l'élément vivace et fécond qui est à la bâse même des sociétés modernes et qui pénètre, envahit et domine toutes les relations des individus. Et comme le dit fort bien l'Honorable juge Fournier dans cette même cause de *Parsons vs. The Citizens Ins. Co.* (1 Cartwright p, 30) :

« In commerce, contracts of sale, of exchange, and

« hiring, are constanly employed and executed. Does it « then follow that any legislation in reference thereto, « must be considered as being a regulation of commerce ? « If this be so—if every thing which has reference to « commerce ought for this reason to come under the ex- « clusive control of the Federal power, the greater portion « of the powers of the provinces would thus become of no « avail, for commerce in its most comprehensive meaning « extends to every thing. It is as defined by a french « author : Un échange de produits et de services. C'est « en dernière analyse, les fonds même de la société. »

Et c'est ce raisonnement du savant juge qui a été adopté et sanctionné par le Conseil Privé dans la cause que je viens de citer.

N'est-il pas évident d'ailleurs, que si l'on veut le maintien de la constitution, (et les tribunaux ne peuvent pas supposer le contraire), il est indispensable d'harmoniser le fonctionnement de ces deux autorités fédérale et provinciale dont les frontières mal définies restent indécises et incertaines sur tant de points ? Ne faut-il pas reconnaître aux législatures provinciales, dans la sphère qui leur est attribuée, leur pleine liberté d'action, avec l'élasticité nécessaire au fonctionnement de toutes les institutions politiques ?

Or, le 2e § de l'art 92, du statut de 1867, permet aux législatures provinciates de recourir à la taxe directe, dans le but de prélever un revenu pour des objets provinciaux. Voilà une attribution de pouvoir formelle et précise.

Que deviendra-t-elle s'il faut renoncer à l'appliquer au commerce ou aux commerçants ? Mais la *capitation* elle-même, la plus directe de toutes les taxes ne pourrait alors atteindre cette caste privilégiée qui ne relèverait que de l'autorité fédérale. Et l'on arriverait à cette singulière anomalie que tandis que, de l'aveu de tous, l'autorité municipale, créature de l'autorité provinciale—pourrait taxer le commerce en taxant les commerçants dans l'exer-

cice de leur profession, l'autorité créatrice serait privée d'exercer pour elle-même ce pouvoir qu'elle peut conférer à une simple municipalité !

Il me paraît impossible de raisonner ainsi et de trouver la justification de ce raisonnement dans les dispositions sainement interprétées du statut Impérial de 1867.

Réglementer le commerce, dans le sens indiqué par la constitution, et déterminé par le tribunal le plus élevé dans notre hiérarchie judiciaire, peut vouloir dire : fixer par des lois générales les conditions de l'importation ou de l'exportation des marchandises, de l'exploitation des pècheries, de la navigation, des rapports commerciaux des provinces entre-elles, etc., etc. Mais on ne saurait certainement donner une telle portée, attribuer un tel caractère à l'imposition d'une taxe décrétée dans un but purement provincial, par le seul fait que cette taxe atteindrait des commerçants. Nous le répétons, ce n'est pas là le sens que le Conseil Privé attache à cet article du statut et ce ne peut être non plus celui que les rédacteurs de la constitution avaient en vue.

La législature de Québec en usant du pouvoir qui lui est formellement attribué et en décrétant pour subvenir aux besoins de son trésor, une taxe directe sur certaines institutions faisant des affaires dans la province, n'a donc pas outrepassé ses pouvoirs, n'a pas légiféré sur une matière qui n'était pas de sa compétence et n'a pas réglementé le commerce.

Mais on objecte ici que si l'on permet aux Législatures provinciales de taxer les commerçants on arrivera indirectement à affecter sérieusement le commerce, à l'entraver même dans certains cas, et l'on invoque la jurisprudence américaine qui a déclaré inconstitutionnelle une taxe imposée par les Etats sur les importateurs.

Aux Etats-Unis, les tribunaux seuls ont le contrôle des pouvoirs législatifs ; eux seuls ont reçu de la constitution elle-même la juridiction nécessaire pour maintenir chaque autorité dans ses limites constitutionnelles.

Tout autre est notre organisation politique. Ici l'autorité fédérale elle-même est armée d'un pouvoir presqu'absolu de *veto* pour réprimer les empiètements que les législatures provinciales pourraient tenter à son détriment et ce n'est qu'implicitement et par une conséquence pour ainsi dire nécessaire de notre système politique, que les tribunaux peuvent être appelés à prononcer en telles matières.

Or, n'est-il pas évident que lors qu'il s'agit, comme dans l'espèce actuelle, de l'imposition d'une taxe, qu'une disposition formelle de la constitution autorise et justifie ; d'une taxe contre laquelle le seule objection plausible aurait pu venir du gouvernement intéressé, savoir du gouvernement fédéral, s'il avait jugé que cette taxe était antipathique à sa législation ; n'est-il pas évident, que le pouvoir judicaire ne saurait se substituer au pouvoir fédéral, usurper sa juridiction, s'attribuer ses fonctions et imposer, lui, son *veto* à cette législation que l'autorité intéressée a tacitement approuvée, puisqu'ayant le pouvoir de la répudier elle ne l'a pas fait !

On soutient, il est vrai, qu'il serait fort impolitique d'exiger ainsi l'exercice de ce droit de *veto* par l'autorité fédéral, en toute circonstance, et qu'il en résulterait bientôt des froissements qui mettraient en danger l'existence même de la confédération. Mais serait-il moins impolitique et moins dangereux de remettre virtuellement l'exercice de ce pouvoir aux tribunaux qui n'ont pas, eux, les avantages des tempéraments diplomatiques et qui n'ont d'autre alternative que de donner une interprétation rigoureusement légale ? Le danger serait évidemment plus grand dans le second cas que dans le premier, et nous n'hésitons pas à croire que c'est parce que les auteurs du statut de 1867 l'ont prévu qu'ils ont cru préférable d'accorder ce droit de *veto* au gouvernement central.

Une dernière objection de la défense nous reste à examiner ; c'est que la compagnie défenderesse n'ayant pas

été créée par la législature provinciale et ayant été dûment licenciée par le gouvernement fédéral pour l'exercice de ses droits, elle échappe au contrôle de l'autorité provinciale.

On n'a pas insisté, dans la plaidorie, sur cette objection et j'avoue qu'elle me parait peu sérieuse. Il serait en effet fort singulier que le pouvoir fédéral pût, soit en la créant lui-même, soit en lui donnant une licence, soustraire une corporation privée au contrôle de l'autorité locale dans une province quelconque.

Aux Etats-Unis, où l'on a si souvent été chercher des exemples, on a maintenu que les Etats ne pouvaient taxer une corporation publique, créé par le pouvoir fédéral dans un but national, mais on n'a jamais été plus loin et, c'est en effet, croyons-nous, la seule limite raisonnable.

Je conclus donc, sur le tout :

1o Que la taxe réclamée est une *taxe directe* ;

2o. Que cette taxe a été imposée par la législature provinciale dans l'exercice légitime d'un pouvoir formellement accordé par la constitution ;

3o. Enfin que cette taxe ne constitue pas une réglementation du commerce dans le sens de l'art. 91, du statut de 1867.

En conséquence, les exceptions de la compagnie défenderesse sont renvoyées et jugement est accordé au demandeur *ès-qualité*, pour la somme demandée.

TEXTE DU JUGEMENT DU JUGE JETTÉ :

La cour, après avoir entendu la plaidoirie contradictoire des avocats des parties sur le fond du procès mû entre elles, pris connaissance des écritures des dites parties pour l'instructien de leur cause, des pièces produites et des admissions données, et sur le tout délibéré.

Attendu que par l'Acte de la Législature provinciale de Québec 45 Vict. Chap. 22, intitule : " Acte pour imposer certaines taxes directes sur certaines corporations com-

merciales," il a été décrété que toute compagnie d'assurance acceptant des risques et faisant des affaires d'assurance en cette province paierait annuellement les taxes suivantes, savoir : 1o. Une compagnie faisant des affaires sur la vie seulement, $500 : 2o Une compagnie faisant des affaires d'assurance autres que sur la vie, $400 : 3o. Une compagnie faisant des affaires de deux ou plusieurs espèces à la fois, la dite taxe de $400 et une taxe additionnelle de $50 pour chaque branche en sus de la branche principale, y compris même l'assurance sur la vie : 4o. Enfin pour chaque bureau en la Cité de Montréal une somme de $100, et que ces diverses sommes seraient payables le premier jour juridique de Juillet chaque année, à l'inspecteur des licences du district de revenu où la compagnie aurait son bureau ;

Attendu que la défenderesse est une compagnie d'assurance ayant un bureau en la Cité de Montréal et qu'elle y fait des affaires sur la vie et contre le feu, en sorte qu'en raison des dispositions susdites du statut invoquée elle est passible des diverses sommes mentionnées, s'élevant à la somme totale de cinq cent cinquante piastres que le demandeur *ès-qualité* lui réclame comme étant due et payable depuis le 3 Juillet 1882 ;

Attendu que la défenderesse plaide à cette demande par deux exceptions, disant :

1o Que la loi invoquée n'a aucune existence légale, attendu qu'elle a été irrégulièrement passée au nom de Sa Majesté qui ne fait pas partie de la Législature provinciale et n'a aucun pouvoir législatif en cette province ;

2o Que si cette loi a une existence quelconque, elle est dans tous les cas inconstitutionnelle et ne peut affecter la défenderesse.

(*a*) Parce que cette compagnie n'a pas été créée par la Législature provinciale et qu'elle est duement licenciée par le pouvoir fédéral pour exercer ses droits ;

(*e*) Parce que la taxe réclamée n'est pas une taxe directe ;

(*i*) Parce que cette taxe n'est imposée que sur cer-

taines classes de la population, qu'elle ne frappe que les corporations commerciales et non les biens, et qu'elle ne tombe dans aucune des catégories d'impôts que la Législature a le droit de décréter ;

(*o*) Parce que cette taxe constitue une réglementation du commerce ;

(*u*) Enfin parce que cette taxe est de la nature d'une licence.

Considérant que Sa Majesté, personnification de l'autorité souveraine dans toutes les provinces de l'empire, fait essentiellement partie des diverses législatures créés par le gouvernement particulier de ces provinces, et que les lieutenants-gouverneurs n'y sont que ses représentants ;

Considérant en conséquence que la loi invoquée a été valablement passée au nom de Sa Majesté ;

Considérant que toute personne ou corporation privée jouissant de droits quelconques dans les limites de la province y est nécessairement soumise au contrôle de la Législature de cette province et aux obligations qu'elle peut imposer pour la contribution de chacun aux charges publiques, et qu'aucune licence du pouvoir fédéral ne saurait soustraire la Défenderesse à ces obligations ;

Considérant que la taxe réclamée frappe les corporations imposées directement et sans intermédiaire entre elles et le fisc, ce qui est le caractère essentiel et principal de l'impôt direct ;

Considérant que la réparation de l'impôt sur les diverses classes de citoyens ne saurait être mise en question devant les tribunaux, la législature étant seule juge de l'opportunité de la répartition par elle adoptée ;

Considérant que rien dans l'acte constitutionnel de 1867 n'enlève aux Législatures Provinciales le pouvoir de taxer les corporations commerciales ou autres, et que la taxe imposée dans l'espèce, qui est de la nature d'un droit de patente exigé à raison de l'exercice d'une profession ou d'un négoce, est essentiellement dans les attributions de l'autorité législative provinciale ;

Considérant que la taxe réclamée ne constitue pas une réglementation du commerce dans le sens de l'article 91, du Statut Impérial de 1867;

Considérant en conséquence que les exceptions et défenses de la défenderesse sont mal fondées, les renvoie, et condamne la dite défenderesse à payer au demandeur *ès-qualité*, la dite somme de cinq cent cinquante piastres, avec intérêt du 3 Juillet 1882, et les dépens distraits à Maitres Lacoste, Globensky et Bissaillon, avocats du demandeur *ès-qualité*.

Le jugement du juge Jetté a été confirmé par la Cour d'Appel, le même jour qu'elle a confirmé le jugement du juge Mathieu, et sur la même division.

Le 12 mai 1883, le juge Rainville a rendu un jugement, à Montréal, dans la cause de *William B. Lambe*, ès-qualité, vs. *The Canadian Bank of Commerce*, où les mêmes questions étaient soulevées, et il a débouté l'action du demandeur.

Voici ses remarques :

There is no contestation between the parties as to the facts alleged; there are admissions which establish these facts, and the parties propose to submit to the decision of the Court the legal questions as to the constitutionality of the law.

This law is entitled " An act to impose certain direct taxes on certain commercial corporations." The first section is in the following terms :—In order to provide for the exigencies of the public service of this Province, every bank carrying on business in this Province (then there are enumerated other companies) shall pay annually different taxes mentioned in section 3 of this act, which taxes are imposed upon each of such corporations respectively. Section 2 says, the word bank comprises saving banks. Section 3 says, the annual taxes imposed upon and payable by the commercial corporations mentioned in section 1, shall be, on banks * * * $1,000 when the paid up capital is from $500,000 to $1,000,000, and an

additional sum of $200 for each million or fraction of a million dollars of the paid up capital from one million to three million dollars, and a further additional sum of $100 for each million or fraction of a million dollars of the paid up capital over $3,000,000, and an additional tax of $100 upon each office in the cities of Montreal and Quebec, and $20 for each office in any other place." By the subsequent provisions of this Act these taxes are payable annually, and the recovery can be made, on behalf of Her Majesty, and by Section 10 these taxes are to form part of the consolidated revenue of the Province.

As the constitutionality of this law depends on the extent of the powers of the Legislature of Quebec, and as our constitutional system has a certain analogy to the system of the United States, it appears to me advisable briefly to explain the systems which govern these two countries, showing the resemblances and the differences.

After this exposition it will be more easy to understand the opinions of the authors who have written upon the American constitution, and that of the judges who have been called upon to pronounce on the numerous questions that have arisen under the operation of the laws in the United States, to ascertain if we can apply them to our system.

Before the Union, the United States constituted a species of Confederation whose authority was much restricted. The States were sovereign, and the authority of the confederation only applied to the States under the form of requisitions, and the absolute power of the States to tax, no matter by what system, belonged to them exclusively without any interference from treaties of commerce made by Congress (4th Wheaton, p. 191-199, Marshall, C.J.). On account of the numerous inconveniences which arose from this state of affairs, inconveniences which considerably reduced the power of the general governement, the people, by the Constitution, changed this condition of affairs altogether, and while leaving the States soveriegn in their

limits, confided to the Government of the Union certain powers which formerly belonged to the different States, substituting a national Government, acting with powers restrained by the people. But, even under this Constitution the existence of these States was necessary, and their independant and sovereign authority within their limits was formally recognized. The people of the United States constituted a nation under one Government, which is supreme, within the limits of its territory and its possessions. On the other hand, the people of each State compose a State, having its own Government and possessing everything that is necessary and essential to a separate and independent existence. The United States might continue to exist, but without the States, in the Union, the United States would no longer exist as such. The respective position and the general condition of the Union of the States has been expressed with much exactitude by Mr. Madison, in the *Federalist.* " The Federal and State Governments are in fact but different agents and trustees of the people constituted with different powers, and designated for different purposes." The powers of the Union are powers enumerated and delegated. I do not intend to here examine the question whether these powers were delagated by the people or by the States. This point is very cleary treated by Chief Justice Marshall, in the case of McCulloch and the State of Maryland, (4 Wheaton, p. 402) and he establishes clearly that the Federal Government derives its powers from the people.

As to the extent of these powers, the general Government possesses only those that are specially attributed to it; beyond this the States are sovereign and possess all powers, which are not prohibited to them by the Constitution. Thus the power to tax is one of the attributes of State sovereignty, and is not derived from the Constitution, and may be exercised absolutely, except so far as it has been abandoned and expressly or impliedly entrusted to the Federal Government. Article 10 of the Constitution

reads in the following terms:—" The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The power of taxing is also one of the attributes of the sovereignty of each State, and it can exercise this power within its limits, unless, by a formal act, it relinquishes or remits it expressly and implicitly to the General Government. Before the Union, each State possessed the absolute and unlimited power to tax, and the Constitution placed no express restriction on this power, except a prohibition to impose tonnage or import duties on imports and exports. And, on the other hand, powers were given to the Federal Government to impose direct or indirect taxes, and import and excise duties, without any restriction, save as to the tax on exports and the system of assessments for the direct tax. The power to tax then was concurrent, and a tax might be imposed on the same object by the two Governments (4 Wheaton, 425, Marshall, C. J.; 7 Wallace, p. 76, Chase, C. J.; 7 Howard, 534, Passenger cases.) At all times this concurrent power might be exercised without the States encroaching on the powers of the Union.

" The grant to the General Government," says Chief Justice Marshall, " of the power to lay and collect taxes is made in general terms, and has never been understood to interfere with the exercises of the same power by the States. Congress is authorized to lay and collect taxes for general welfare the United States. This does not interfere with the powers of the States to tax for the support of their own governments, nor is the exercise of that power by the States an exercise of any portion of the power that is granted to the United States. In imposing taxes for State purposes they are not doing what Congress is empowered to do. Congress is not empowered to tax for those purposes which are within the exclusive province of the States. When then each government exercises the power of taxation, *neither is exercising the power of the other.*" (9

Wheaton, p. 199, Gibbons and Ogden.) But there are cases where the powers of the General Governement are exclusive, and Mr. Hamilton in No. 32 of the *Federalist*, says,that there are exclusive delegations of the sovereignty of the States in three cases :—

1st.—Where exclusive power is in terms given to Congress.

2nd.—Where an authority is granted to the Union, and the States are prohibited from exercising a like authority.

3rd.—Where an authority is granted to the Union, to which similar authority in the States would be absolutely and totally contradictory and repugnant, 7 Howard,p. 369, Passenger cases, and 479 and 499, 5 Wheaton, 48, Strong J. The question as to whether the powers of the Federal Government are exclusive, as regards the regulation of commerce and bankrupt laws has presented itself in several cases. Among others is that of Gibbons and Ogden, (9 Wheaton) that of Sturges and Crowninshield, (4 Wheaton, p. 192) and that of the Passenger cases, (7 Howard, 283 and 393.) We will return to these questions when discussing the merits of the case.

We will now pass to our own constitution and explain as briefly as possible the systeme on which the rights and powers of the Federal and Provincial Government depend, and the respective position of these Governments.

Before Confederation, the Provinces, like the different States that composed the Union, existed with sovereign power. But our constitution, different from the constitution of the United States, in place of leaving this sovereignty with them, gave it to the Dominion Parliament. And in place of delegating and attributing certain powers to the General Government, leaving the provinces with the power which they possessed before, except those which would come in conflict with those delegated to the Fededal Government, all powers which the Provinces possesed, and which were necessary for the good government of Canada, were given to the Federal Government, leav-

ing only to the Provinces those powers delegated to them, and in order to avoid the difficulties which arose in the States, the concurrent powers were removed with several exceptions, in order to give exclusive powers to the Government of Canada ; in a word, everything was vested in the Dominion Government, and the powers of the Provinces were only exceptional, although they were sovereign and supreme in their sphere.

Section 3 of the Constitutional Act says :—The provinces shall form and be one Dominion under the name of Canada. Section 17 says :—There shall be for the Dominion of Canada a Parliament composed of the Queen, a Senate and the House of Commons. Canada is divided into four Provinces. Each Province will have a Legislature, composed of a Lieutenant-Governor and a Legislative Assembly (and Legislative Council for Quebec) Section 69 and 71.

Now, how are the powers distributed ? Section 91 is in the following terms :—" It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces, and for greater certainty, but not so as to restrict the generality of the foregoing terms of this section, it is hereby declared, that, (notwithstanding, anything in this Act,) the exclusive Legislative authority of the Parliament of Canada, extends to all matters coming within the classes of subjects next hereinafter enumerated."

The Act then enumerates twenty-nine classes of subjects, among them the following :

2—The regulation of trade and commerce.

3—The raising of money, by any mode or system of taxation.

15.—Banking, Incorporation of banks, and the issue of paper money.

And the Act adds :—" And any matter coming within any of the classes of subjects enumerated in this section, shall not be deemed to come within the class of matters of a local or private nature, comprised in the enumeration of the classes of subjects by this act assigned exclusively to the Legislature of the Provinces."

Section 92, defines the powers of the Provincial Legislatures, and says :—In each Province the Legislature may *exclusively* make laws in relation to matters coming within the classes of subjects next hereinafter enumerated, that is to say :

2.—Direct taxation within the Province, in order to the raising of a revenue for Provincial purposes.

11.—The incorporation of companies with Provincial objects.

16.—Generally all matters of a merely local or private nature in the Province.

According to this definition of powers, it would appear, by the first part of the preamble of sec. 91, that the federal parliament would have power only over matters and subjects which are not exclusively assigned to the provinces, but by the second part of this preamble the exclusive powers of the provinces seem to be restricted, the exclusive legislative authority of the Parliament of Canada extending to all matters enumerated in the twenty-nine classes of subjects specially mentionned in sec. 91. It would seem then, that with regards to all matters specially mentionned in sec. 91, the provincial legislatures have no power, even if there should be found in the twenty-nine classes matters which, by sec. 92 seemed to be exclusively assigned to the provincial legislatures. However, as was stated by the Privy Council, in the case of Parsons and The Queen (5 Legal News, p. 25), these two sections must not be interpreted so absolutely, and a reasonable interpretation must be assigned to them in cases where the same matters are designated in the classes of these two sections. However,

this is a difficulty which will seldom occur, and with reference to taxes, the powers of the federal parliament and the provincial legislatures are concurrent within certain limits, but can never come into conflict. In fact, the Federal Parliament has the right to raise money by any mode or system of taxation. But it can evidently only raise money for federal objects, and provincial legislatures are entiled to raise money only by " direct taxation, within the Province, in order to the raising of a revenue for Provincial purposes ", and indirect taxation by " shop, saloon, tavern, auctioner and other licences."

Chief Justice Marshall in Gibbons *vs.* Ogden (9 Wheaton, p. 198) expresses himself as follows:—" The grant of " the power to lay and collect taxes, is made in general " terms, and has never been understood to interfere with " the same power by the States. * * * And a power in " one to take what is necessary for certain purposes is " not, in its nature, incompatible with a power in another " to take what is necessary for other purposes. Congress " is authorised to lay and collect taxes to pay the debts " and provide for the general welfare of the United States. " This does not interfere with the power of the States to " tax for the support of their own governments : nor is " the exercise of that power by the States, an exercise of " any portion of the power that is granted to the United " States. In imposing taxes for state purposes, they are " not doing what Congress is empowered to do. Congress " is not empowered to tax for those purposes which are " within the exclusive province of the States. When, then, " each government exercises the power of taxation, nei- " ther is exercising the power of the other."

The power to tax can therefore be exercised in a concurrent manner without there being any encroachment of the rights of the Federal Government on those of the States and *vice versa.*

We must not forget that, under the American Constitution, the powers of taxation conferred on Congress are un-

limited, except as regards the tax on exports, and the obligation to tax according to the rule of apportionment in the case of direct taxation, and of uniformity in other cases. On the other hand, those of the States are also absolute and unlimited, with the exception of their disability to impose duties on imports and exports and tonnage dues. But neither government can tax the means employed by the other in the exercises of their powers. " No state has the " right to tax the means employed by the government of " the Union for the execution of its powers." (4 Wheaton, 429—9 Wheaton 39—9 Wallace, 591.)

And on the other hand, " The right of the States to " administer their own affairs, through their Legislative, " Executive, and Judicial departments, in their own man- " ner, through their own *agencies*, is conceded by the uni- " form decisions of this Supreme Court. This carries " with it an exemption of those agencies and instruments " from the taxing power of the Federal Government." (17 Wallace 327, 8 Wallace 547 and 18 Wallace 30.)

" No one " says Judge Strong, in the case of Railroad Co. *vs.* Penniston (18 Wallace 29), " ever doubted that " before the adoption of the Constitution of the United " States. each of the States possessed unlimited power to " tax, either directly or indirectly all persons and property " within their jurisdiction..... except so far as such tax- " ation was inconsistent with certain treaties. " And " the constitution contains no express restriction of this " power other than a prohition to lay any duty of tonnage " or any duty on imports or exports." (7 Wallace, 76 *et seq.*)

" That the power of taxation is retained by the States ; " that it is not abridged by the grant of a similar power " to the government of Union ; that it is to be concur- " rently exercised by the two governments are truths " which have never been denied." (Marshall, C. J. ; 4 Wheaton 425.)

These are the principles which have guided the courts in the United States in the adjudication of the different question which have been submitted to them.

But our Constitutional Act is very different—all the powers belong to the Federal Government, except such as are specially assigned to the provincial legislatures. It cannot be said, therefore, that they have retained the power of taxation which belongs to every sovereignty, that this power has not been diminished by the Constitution, as is said of the States of the Union. Far from that, if the power of taxation by the system of direct taxation had not been specially assigned to the provincial legislatures, they would not have the power to tax by any mode whatever. For, as has been already shown, our Constitution differs from that of the United States; our provinces, contrary to the American system, have not retained concurrent powers, and what is not granted to them is taken away from them. However, they incontestably possess the power of taxation by direct taxation, within the limits of the province, in order to the raising of a revenue for provincial purposes, and finding that the Federal Parliament has exclusive power to tax by any mode including direct taxation, the Privy Council, in the the Queen and Parsons, referring to the pre-eminence which it was sought to give the Federal Parliament, said : " It is obvious that, in some cases where this apparent conflict exists, the legislature could not have intended that the powers exclusively assigned to the provincial legislatures, should be absorbed in those given to the Dominion Parliament. Take as one instance the subject of " Marriage and Divorce " contained in the enumeration of subjects in sec. 91 ; it is evident that solemnization of marriage would come within this general description, yet solemnization of marriage, in the province, is enumerated among the classes of subjects in sec. 92, and no one can doubt, notwithstanding the general language of sec. 91, that this subject is still within the exclusive authority

of the legislatures of the provinces. So the raising of money by any mode or system of taxation is enumerated among the classes of subjects in sec. 91 ; but though the description is sufficiently large and general to include direct taxation within the province, in order to the raising of a revenue for provincial purposes, assigned to the provincial legislatures by sec. 92, it obviously could not have been intended that in this instance also, the general power should override the particular one." They then add : " It could not have been the intention that a conflict should exist, and in order to prevent such a result, the two sections must be read together, and the language of the one interpreted, and, where necessary, modified by that of the other."

Judge Taschereau, in the case of Angers *vs.* The Queen, speaking of the same difficulty as to the power to tax, says : " A litteral interpretation of these two sections (91 and 92) " would make them contradictory. It has been stated that, " in order to reconcile these two sections, the words " ' exclusively ' must be construed as referring to the " Imperial power. I do not concur in this view, I prefer " to admit that there is a contradiction in the letter of the " Statute, and giving the power of direct taxation both to " the central and local power, and this in accordance " with the well known rule, when a general intention is " expressed in a statute, and the Act also expresses a parti- " cular intention incompatible with the general intention, " the particular intention shall be considered as an *excep-* " *tion.*" For my part, notwithstanding my respect for these authorities, I find nothing incompatible in sections 91 and 92, as to powers of taxation, and I do not see any case where the power to tax possessed by the provincial legislatures is a modification or an exception to the like power of the Federal Government. For these powers may be exercised concurrently on the same objects without coming in conflict, and the tax imposed on a thing by the federal power can never be an obstacle to the imposition

of a tax of the same amount on the same thing by the provincial legislatures. To the authorities already cited, I will add that of Judge Clifford, in the case of Transportation Co. *vs.* Wheeling (99 U.S. Sup. C. p. 281) : " Power " to tax its citizens or subjects in some form is an attri- " bute of every governement, residing in it as part of " itself ; and hence it follows that the power to tax may " be exercised at the same time upon the same objects of " private property by the State and by the United States, " without inconsistency or repugnancy."

In order to determine whether this tax imposed on the Defendants is legal and constitutional, we must then see if among the powers specially assigned to the Legislature of Quebec, can be found the power of imposing such tax. The only clause relied on is the following :—" 2. Direct taxation, within the province, in order to the raising of a revenue for the provincial purposes." The first question, then, is whether the tax is direct. Secondly, is it imposed within the limits of the province ? Thirdly, does it interfere with the federal powers for the regulation of trade and commerce ? Fourthly, is it an interference with federal powers, in relation to banking and the incorporation of banks ?

First, what is a direct tax, and what is an indirect tax ? It is useless to cite all the opinions of economists and jurisconsults who have endeavored to *define* direct and indirect taxation. They have been reproduced in almost every case. I will, however, quote the definition of Mill :—" Taxes are either direct or indirect. A direct tax is one which is demanded from the very person who it is intended should pay it. Indirect taxes are those which are demanded from one person, in the expectation and intention that he shall indemnify himself at the expense of another." The principle seems to be generally admitted, but the difference arises in the application. It is impossible to find authorities or precedents perfectly applicable, for no other system is similar to our own.

Under the American Union, the States, with a few limitations, have absolute power of taxation, either direct or indirect, so that there has been no occasion to examine whether a tax imposed by a State was direct or indirect. But it is different with Congress. The latter has power of direct or indirect taxation, with certain limitations, but it can only impose direct taxation by a system of apportionment.

Par. 3 of sec. 2 of the Constitution says :—" Direct taxes " shall be apportioned among the several States, according " to their respective numbers." Par. 4 of sec. 9 says : " No direct tax shall be laid unless in proportion to the census or enumeration before directed to be taken." Under this system, the question has arisen whether taxes imposed by Congress were direct or indirect; for if they were direct and not imposed by apportionment, they were clearly unconstitutional. And if they were indirect and uniform, they were uncontestably constitutional.–The first reported case having bearing on this question is that of Hylton *vs.* U.S. which date from the year 1796 and in which a tax on carriages was under discussion ; it was decided that this was an indirect tax. 3 Dallas p. 171. One of the cases in which this question is best discussed is that of Venzie Bank *vs.* Fenno, reported in 8 Wallace, p. 553. It treated of a tax imposed by Congress on notes of State banks in circulation. Chief Justice Chase in rendering judgment expressed himself thus :—" Much diversity of opinion has " always prevailed upon the question, what are direct " taxes ? Attempts to answer it by reference to the defini- " tions of political economits have been frequently made, " but without satisfactory results. The enumeration of " the different kinds of taxes which Congress was autho- " rised to impose was probably made with very little refe- " rence to their speculations. The great work of Adam " Smith, the first comprehensive treatise on political eco- " nomy, in the English language, had then been recently " published ; but in this work, though there are passages

" which refer to the characteristic difference between " direct and indirect taxation, there is nothing which " affords any valuable light on the use of the words " ' direct taxes ' in the constitution. We are obliged " therefore to resort to historical evidence, and to seek " the meaning of the words in the use, and in " the opinion of those whose relations to the go- " vernment, and means of knowledge, warranted them " in speaking with authority. And considered in this " light, the meaning and application of the rule, as to " direct taxes, appears to us quite clear." He then enumerates the different taxes imposed by Congres and adds: " This review shows that personal property, contracts, " occupations, and the like, have never been regarded by " Congress as proper subjects of direct taxation. * * * " It may be rightly affirmed, therefore, that in the prac- " tical construction of the Constitution by Congress, " direct taxes have been limited to taxes on land and " appurtenances, and taxes on polls or capitation taxes." Afterwards he cites the case of Hylton *vs.* U. S. and the opinion of Judge Chase, who rendered the Jugdment of the Court, and finally the case of Pacific Insurance Co. *vs.* Soule in which it was decided that a tax imposed by Congress on the income of insurance companies was an indirect tax. (7 Wallace p. 433) and Judge Chase in the case of Venzie Bank *vs.* Fenno, after having reviewed all the decisions of the courts and the opinions of lawyers and statesmen on this question concludes in these terms: —" Il may be safely assumed, therefore, as the unani- " mous judgment of the Court, that a tax on carriages is " not a direct tax. And it may further be taken as esta- " blished upon the testimony of Paterson, that the words " ' direct taxes,' as used in the constitution, comprehended " only capitation taxes and taxes on land, and perhaps " taxes on personal property by general valuation and " assessment of the various descriptions possessed within " the several States. It follows necessarily that the power

" to tax without apportionment extends to all other " objects." (8 Wallace, p. 546.)

It seems to me, then difficult to apply to our constitutional system the judgments rendered under the american constitution. And it is this probably that has made Kent say, in weighing the decision, in the case of Hylton *vs.* U. S., reproducing the opinion of Judge Tredell, that " The Constitution contemplated no taxes as direct " taxes, but such as Congress could lay in proportion to " the census. All direct taxes must be apportioned. As " all direct taxes must be apportioned, it is evident that " the Constitution contemplated none as direct but such " as could be apportioned. If this tax (on carriages) can- " not be apportioned it is therefore, not a direct tax in " the sense of the constitution." (3 Dallas, p. 181.) And Booley, after having given a definition of direct and indirect taxes, adds. " The term, direct taxes, is employed in " a peculiar sense in the federal Constitutton in the pro- " vision requiring such taxes to be apportioned according " to representation and they are perhaps limited to capi- " tation and land taxes." And he cites the different cases we have already mentioned. (Cooley on taxation, p. 5.)

We must, then, seek elsewhere the solution of the question, availing ourselves, however, of the opinions of those who have written upon the American Constitution and questions of taxation, and of the judicial decisions upon analagous questions. Let us first see upon what the tax in question is imposed. The Act says every bank doing business within the Province shall pay an annual sum of $1,000, when its paid up capital is from half a million to a million, and an additional sum of $100 on each office in the cities of Montréal and Quebec.

Taxation is, therefore, imposed on banks on account of their doing buisness within the limits of the Province of Quebec and of their opening offices there. Any bank incorporated by the Dominion, and doing business in the rest of the Dominion, but in the Province of Quebec, is

not subjected to this tax. This tax is not, therefore, imposed on the property of the bank, but on the privilege which the Province of Quebec gives it to do business. It is, therefore, a *tax on the franchise.* "The right of a corporation to exist and exercise the powers vested in it by its charter is called its franchise." Borroughs on Taxation 83, p. 164. And at page 168, sec. 85, he asks:—" when is the tax on the franchise, as distinguished from the property of the corporation ? " This question has arisen in a number of cases under the Act of Congress, exempting United States bonds from taxation; if the tax was laid upon the property of the corporation as such, all that portion invested in United States bonds was exempt, whereas if the tax was imposed on the franchise it had no reference to the United States bonds and the whole tax must be paid. " When the tax is on the nominal capital of a bank without regard to the value of the property of which it is composed, such a tax is *annexed* to the *franchise* as a royalty for the grant and is a tax *on the franchise* and not on the property."

This is the opinion expressed by Judge Nelson in the Supreme Court of the United States in the case of the Bank of Commerce and New-York City—2 Black, 620 and 628—in speaking of the tax question he says : " The capital of the bank is taxed under existing laws in that State (N.-Y.) upon valuation like the property of individual citizens and not as formerly on the amount of the *nominal capital without regard to loss or depreciation.* According to that system of taxation it was immaterial as to the character or description of property which constituted the capital, as the tax imposed was wholly irrespective of it.

The tax was like one *annexed to the franchise as a royalty* for the grant. But since the change of this system it is agreed the tax is upon the property constituting the capital. An Act taxing the cash capital of mutual insurance companies *is a tax on the franchise and not on the*

property—36 Connecticut, p. 512, and Hilliard, on taxation ch. 1, sec. 36, p. 20. And in the case of the Province Bank *vs.* Billings, in which the tax in question was an annual tax on each bank "of $1.25 on each and every thousand dollars of the capital stock annually paid in," it is admitted that the tax was a tax on the franchise. "No one pretends that it is a tax upon the property of the bank. The capital stock is referred to in order to equalize the duty among the banks themselves. The duty is not upon the capital stock but upon the banks. In relation to each other it is a duty in proportion to the capital stock, 4 Peters, p. 427 and 542. The question which presented itself in this case was, whether the granting of a charter was a contract or not, and whether the State after having granted a charter without mentioning a tax can afterwards tax the franchise of a corporation. "One of the elements," says Burroughs, "by which a franchise tax is distinguished from a property tax is that a property tax is imposed upon a valuation which is the basis of computation. It is assessed by assessors, *where it is situated or at the residence of the owner;* while the franchise tax imposed directly by the Legislature is not assessed by assessors, and the amount depends on the amount of business transacted by the corporations and the extent to which they have exercised the privilege granted in their charter without reference to the *value* of their *property* or the *nature* of the investment made of it." Burroughs, sec. 85, p. 169. The tax on corporations may be imposed on the franchise or the property of the corporation or both. When imposed on its franchise the amount of the tax may be measured by its capital stock either at par or at its nominal value, or by its dividends, or it may be a specific amount. It may also be taxed on its property in which the capital is invested. And the stockholders may in addition be taxed on the value of their shares and also on the profits or dividends as income. And what is the nature of a tax on the franchise?

" This tax," says Burroughs, " is in its *essential nature* the same as the *license tax* and the same principle as to the power of the State to tax, applies to domestic corporations when they are first chartered, as applies to foreign corporations. In the case of a foreign corporation the bonus or tax is the amount paid for the *privilege of exercising its corporate powers in the State;* in the case of a domestic corporation it is the amount paid as the price of its corporate existence. It only exists by permission of the State, and the State may prescribe the terms on which it will grant its permission." Burroughs, sec. 85, p. 166. If the tax on franchise is of the nature of a license, and similar to a license, if it is a tax imposed to give to a corporation the privilege of exercising its corporative powers, the tax in question is clearly unconstitutional. For, according to our Constitution, the Provincial Legislatures have only the power of according the licenses enumerated in the 9th chap. of section 92 of the British North America Act. Taking as well established the interpretation which has been given to the words " and other licenses," as meaning only licenses of the same kind, the constitutional act has evidently not wished to grant to the Provincial Legislatures the right of granting or refusing to banks, incorporated by the Federal power, the privilege of exercising their corporative rights, of doing their business in the limits of these Provinces. For this right would be in formal contradiction to the exclusive power of the Federal Parliament, granted to it by chap. 15 of section 91, of legislating on banking and the incorporation of banks. These powers of the Federal Parliament extend over the whole Dominion, and if it has the exclusive power of incorporating banks, it has also the exclusive power of allowing them to exercise their functions and to make operations in the limits of the Dominion without any power to prevent them from doing so, otherwise the Federal power would be neither exclusive power or sovereign. "A tax on a corporate franchise," says Cooley, "may

or may not be just or politic. If the business is one of which corporations have a monopoly, a tax on their franchises, however heavy, would not be burdensome, because the result would only be to add to the costs of whatever the corporations supplied to the public, *so that the tax would really be paid by the community at large.*" Cooley, on Taxation, ch. 1, p. 25:—If it is the public who pays, it is, therefore, all the definitions being given, the motions being received and all the opinions being accepted, an indirect tax and evidently unconstitutional. In fact, what difference can there be between the present tax and that by which the Legislature would say: "In order to do business in the Province, the banks shall take out a license and pay a percentage on their capital and so much for each office"? Would the effect be different? I seek in vain for any; I cannot discover any possible difference in the practical result. And yet everybody will admit that if the Legislature had compelled the banks to take out a license, the law would be unconstitutional and *ultra vires.*

But it was said at the argument that it was not a tax on the franchise but a capitation tax. No authority or precedent has been cited to establish or justify such a proposition. The bank, as a legal entity, does not reside within the Province of Quebec, and I do not think that a corporation has ever been considered as a person on which a tax may be laid as on the head of a natural person.

Lastly, it has been said that the tax is imposed on the capital of the banks, and that it is a direct tax on the property. If the truth of this proposition were admitted, the tax would still be illegal and unconstitutional, and for two reasons: the first, because part of this capital is invested in securities of the Federal Government (in dominion notes) and, the second, because this capital is not entirely situated within the limits of the Province.

It has, in effect, been decided, in the United States, that a tax imposed by a State upon bonds issued for loans made to the Government of the Union is inconstitutional,

2 Peters, Rep. 449. Weston *vs.* The City of Charleston. Chief Justice Marshall, in rendering judgment, expressed himself in the following terms :—" Congress has power " to borrow money on the credit of the United States." « The stock it issues is the evidence of a debt created by « the exercise of this power. The tax in question is a tax « upon the contract subsisting between the Government « and the individual. It bears directly upon that contract. « ..... If the States possess the power to tax a contract for « the loan of money (to the U.S.), what shall arrest this « principle in its application to every other contract. ..... « The tax on Government stock is thought by this Court « to be a tax on the contract, a tax on the power to bor- « row money on the credit of the United States, and con- « sequently to be repugnant to the constitution.

And in the case of Bank of Commerce *vs.* New York City, the question has been decided in a more direct manner, and the Supreme Court of the United States gave judgment that :—" That portion of its capital which a New York Bank has invested in the stocks, bonds, and other securities of the United States, is not liable to taxation by the State." 2 Black, p. 620. And Judge Nelson, in rendering judgment, after having referred to the case of Weston *vs.* City of Charleston, and to the opinion of Chief Justice Marshall, says :—" The result of this doctrine is, " that the exercise of any authority by a State Govern- " ment trenching upon any of the powers granted to the " general Government, is, to the extent of the interfer- " ence, an attempt to resume the grant in defiance of " constitutional obligation ; and, more than this, if the " encroachment or usurpation to any extent is admitted, " the principle involved would carry the exercise of the " authority of the State to an indefinite limit, even to the " destruction of the power. For, as truly said by Chief " Justice Marshall in the case of Weston *vs.* City of " Charleston, in respect to the taxing power of the State, " If the right to impose the tax exists, it is a right which,

" in its nature, acknowledges no limit, it may be carried " to any extent within the jurisdiction of the State which " imposes it. ..... The power to borrow money on the " credit of the United States is admitted. It is one of the " most important and even vital functions of the géneral " Governement ..... But of what avail is the function or " the means if another Government may tax it at discre- " tion ? It is apparent that the power, function or means, " however important and vital, are at the mercy of that " Governement. And, it must always be remembered, if " the right to impose a tax at all exists on the part of the " other Government, " it is a right which in its nature "acknowledges no limits. "

The same principle and the same doctrine have been again established by the same Court in the cases called " Bank Cases." (2 Wallace, p. 200.)

Our Banks, under the general Banking Act, and the Defendant in the present suit comes under that Act, are obliged to have half of there reserve in Dominion notes They are then obliged to employ a part of their capital in acquiring securities of the Federal Government and this latter has employed this means as an indirect mode of effecting a loan. In taxing the capital of these banks, therefore, the Provincial Legislature has taxed a power reserved exclusively to the Federal Government and thus the tax is unconstitutional.

In the second place, this tax would still be unconstitutional for it would be imposed on a capital of which it is admitted that the greater portion is neither situated nor employed within the Province, and it would consequently be beyond the powers conferred on the provincial legislatures of taxation within their limits. In fact, if this tax is a tax on the franhise, this franchise is not entirely situated within the limits of the Province; if it is on the capital, it is admitted that a great part is employed in the other provinces of the Dominion.

The Counsel for the Bank of Toronto enunciated the

following proposition : " Any tax imposed on a corporation created by the federal authority must necessarily reach parties beyond the Province, and is therefore unconstitutional ; as the only mode of taxation allowed to the Province is that of *direct taxation within the Province.*" He, however, modified this proposition at the argument by applying it only to tax now in question. Thus restricted I think it correct. But I do not think it would be true if applied generally. For, if a tax on moveables may be a direct tax, " I think a tax on bank stock owned by persons residing within the Province would be a direct tax, within the Province," that is to say, on a thing within the Province, for personal rights follow the domicile of the owner.

Nor is there any doubt in my opinion that provincial legislature have the right to tax the immovable properties owned by the banks within the Province. I have not, however, to express a judicial opinion on that point, nor on the question whether an Act taxing the immoveable property of banks and not that of citizens generally, would or would not be unconstitutional. But I think I may, without fear, express the opinion that if the immoveable property within the Province were taxed by the Provincial legislature, that owned by the banks would not be exempt.

The second and third objections to the constitutionality of the Act are that it is an interference with the rights of the Federal Parliament and an infringement of its powers (1) to regulate trade and commerce ; (2) to legislate as to banks and the incorporation of banks. These powers of the Federal Parliament, as we know, are exclusive, and there is nothing in the classes of subjects attributed to the provincial legislatures, whick can at all come under these two matters assigned to the Federal Parliament. There can, therefore, be no question as to them, of conflic or concurrence of powers, and the provincial legis-

latures have evidently no right to legislate on trade and commerce, nor on banks and their incorporation.

The American Constitution, as we have seen, is less restrictive than our own, and it gives to Congress power to " regulate commerce with foreign nations, between the several States, and with the Indian tribes," without, however, giving it this power exclusively. But it has, nevertheless, been recognized as belonging to it exclusively. There is not one word in the whole Constitution having reference to banks or the incorporation of banks. And this power also has been acknowledged as belonging to the States. And the Supreme Court has only recognised the power of Congress to incorporate the bank of the United States in virtue of the general and absolute power which belongs to every sovereign State to appoint the necessary and proper means to carry on the machinery of government, and not in virtue of the special powers which were assigned to it by the Constitution. Vol. 4, Wheaton, *McCulloch* vs. *Maryland*, p. 425 ; vol, 9, Wheaton, *Osborne* vs. *The United States Bank*, p. 859. Judge Bradley, in the case of the *Pacific Railroad* vs. *Penniston*, cites on this subject the opinion of Chief Justice Marshall in the case of McCulloch, which establishes this doctrine, and he adds : "The suggestion of Chief Justice Marshall, in the above quotation, that Congress cannot create any corporation except for public and national purposes, is worthy of particular notice. The inference is obvious that any corporation rightfully created by Congress being necessarily public and national in its object, is beyond the reach of State taxation. That suggestion, it is true, was made in reference to a corporation established for business purposes within the states of the Union. And in such a case it is evident that the proposition must be true, viz. : that Congress cannot create a corporation except for public and national purposes." 18 Wallace, p. 43.

Are these principles and reasonings applicable to our

banks ? As, under our Constitutional Act, the exclusive power to regulate trade and commerce and to legislate on banks and the incorporation of banks, is assigned in the same terms to the Federal Parliament, the principles applicable to the questions which may arise with regard to one power are identical with those which may arise with regard to the other ; and if a law of the Provincial Legistature, imposing a tax on an article of commerce or on an industry is unconstitutional, as being an encroachment on the federal power and an infraction of its exclusive right to regulate trade and commerce, so also, and perhaps with greater reason, a law imposing a tax on a bank or on its operations, must be declared unconstitutional as an infraction of the exclusive right of the Federal Government to legislate on banking and the incorporation of banks.

There is a parity of reason, for under the Constitution of the United States, although the power to tax be concurrent and belong equally to the United States and to the different States, on the same objects, it is evident that the power to regulate commerce cannot be concurrent, nor be exercised at the same time by the two sovereingties.

" When each Government," says Chief Justice Marshall, " exercises the power of taxation, neither is exercising the power of the other. But when a State proceeds to regulate commerce with foreign nations, or among the several States, it is exercising the very power that is granted to Congress and is doing the very thing which Congress is authorised to do. There is no analogy then between the powers of taxation and the power of regulating commerce." (9 Wheaton. Gibbons *vs.* Ogden, p. 199. 7 Howard, 393 Passenger Cases.)

On this point of the case, we will consider together the two objections raised against the constitutionality of the law, and will give our attention mainly to that which is based on the principle that this law is an infraction of

the exclusive power of the Federal Government to legislate on banking and the incorporation of banks. The cases of McCulloch *vs.* State of Maryland, and Osborne *vs.* U. S. Bank have frequently been cited during the argument and are referred to at length in the factums which have been submited. But the decisions in these two cases have been rendered exclusively on the principle that the States could not tax the means or instruments created by Congress for the purpose of exercising its powers. It is known that the Bank of the United States was under the immediate control of the Government, and was like one of the wheels of the governmental machine. This Bank of the United States was always, to a certain degree, a private institution ; the Federal Government owned only a fifth of the capital stock and the rest was owned by individuals, and out of twenty-five directors there were but five appointed by the Government, and it carried on, moreover, besides the operations necessitated by the financial requirements of the Union, ordinary banking business, in exactly the same manner as the States banks. The National Banks are also placed in the same category. (3 Wallace, 573. Van Allen *vs.* The Assessors.) Our banks cannot perhaps be placed on the same footing and cannot be considered as means employed by the Dominion Government for the purpose of exercising the national and public functions which have been conferred upon it by the Constitution. It is very true that the Federal Government employs the banks for the purpose of circulating the notes of the Dominion, and that by sec. 14 of the General Banking Act they are obliged to have at least a third of their reserves in Dominion notes. It is true, too, that by sec. 15 the banks to which the General Act applies are declared to be exempt from the tax which was then imposed on their notes in circulation. They are, moreover, subjected to certain restrictions ; they cannot issue bills of a lower denomination than five dollars. This restriction is evidently imposed by the Federal

Government in order to protect the circulation of Dominion notes. This entire system may very well be looked upon as establishing our banks as a branch of the fiscal administration of the Dominion, and as such beyond the legislation of the provincial legislatures.

But it is possible, however, that our banks may be merely private institutions, not being in any way joined to the Government, and not created for the purpose of exercising its powers by their means, in their being employed as its agent. Chief Justice Chase, in speaking of the National Banks expresses himself in the following terms: "These observations show that the national banking associations are much more intimately connected in their functions and operations with the national government, than was the Bank of the United States. They are, therefore, entitled to all the protection and all the immunities to which that bank was entitled." (3 Wallace 590. Van Allen *vs.* The Assessors.)

And with regard to these national banks it is admitted that the States cannot tax their capitals or yet their franchises or their operations, and Congress by the Act of 1863, creating these banks, and the amendment made in 1864 has permitted, under certain restrictions only, the taxation of the stocks or shares of individuals in these national banks; and when these conditions have not been fulfilled by the States, the laws imposing taxes on these shares have been unconstitutional. (2 Black, p. 620. Bank of Commerce *vs.* New-York City. 2 Wallace p. 200, Bank Tax case.) If Congress has the right to subject this tax to conditions, we must necessarily conclude that it has the right to prohibit it and to prevent the States from imposing it, or rather it would be by proviso 41 only that Congress has given permission to the States to tax these shares. Stress has not been laid on this point, however, and I think I should not go further than merely to point out the difficulty, leaving it to be decided when it shall formally be brought up.

I confine my judgment to the objection based on the unconstutitionality of the Act, in so far as it encroaches on the powers of the Dominion Government to legislate on banks and the incorporation of banks. We must not lose sight of the fact that the Federal power is exclusive, and the provincial legislatures have no right to legislate on these matters, and consequently have no right to incorporate banks. The Federal Parliament has exercised these powers; it has continued the charters of the banks and regulated their operations, and, by sec. 4 of the General Act, has permitted them to open offices in all localities or places within the Dominion. The banks, then, have the power and the privilege granted by the only competent authority of establishing as many branches as they please within this Province, and of transacting business. On what then is the tax in question imposed? On each bank transacting business and on each branch opened. This tax is, therefore, imposed on the powers and privileges granted by the Federal Parliament; then this Government would not be sovereign nor exclusive. In one of the most celebrated American cases, Brown *vs.* Maryland (12 Wheaton, 419) in which the question was whether a tax on importations was constitutional, the Court decided that it was not, for two reasons: 1st Because it was repugnant to that clause of the Constitution which declares " that no State shall lay any impost or duties on imports or exports." 2nd. Because it was also repugnant to the clause which empowers Congress " to regulate commerce with foreign nations." Chief Justice Marshall said, " Commerce is intercourse. " It is inconceivable that the power to authorize this traf- " fic, when given in the most comprehensive terms, with " the intent that its efficacy should be complete, should " cease at the point when its continuance is indispensa- " ble to its value. To what purpose should the power to allow importation be given unaccompanied with the power " to authorise a sale of the thing imported "? And after

speaking of the consequences of the tax he adds, " Such " a state of things would break up commerce. " It will " not meet this argument that this state of things will " never be produced, that the good sense of the States is " a sufficient security against it. The Constitution has " not confided this subject to that good sense. It is pla- " ced elsewere. The question is, where does the power " reside? Not how far it will probably be abused. The " power claimed by the state is, in its nature, in conflict " with that given to Congress; and the greater or less " extent in which it may be exercised does not enter into " the enquiry concerning its existence." (12 Wheaton, p. 446 and 447.) If the argument of the Chief Justice is sound, it will apply with much greater force to the case before us.

Of what use would it be for the Federal Government to create banks if they could not do business without the permission of the provincial legislatures? The charter of a bank is a licence, as Chief Justice Chase says, in the case called " License Tax," " It is not doubted that were Congress possesses constitutional power to regulate trade or intercourse, it may regulate by means of licenses as well as in other modes; and in case of such regulation, a license will give to the licencee authority to do whatever is authorized by its terms..... All such licenses confer authority and give rights to the licensee." (5, Wallace, p. 470.)

Banks do not exist by virtue of provincial authority, and do not carry on their operations by provincial permission. Their existence, their privileges and their operations cannot, therefore, be submitted to the control of the provincial legislatures; otherwise the federal power might be annihilated. " The sovereignty of a State," says Chief Justice Marshall, " extends to everything which exists by its own authority, or is introduced by its permission." (Wheaton, 429; McCulloch *vs.* Maryland; 99 U. S. Rep. 279—Clifford J.) And in the case now

before us, the bank does not exist by the authority of the Quebec Legislature, and does not transact its business in this Province by its permission. It does not derive its existence or its privileges from the authority of the Legislature, and it is completely independent of its permission.

It was admitted, for the sake of argument, in the case of McCulloch, that Congress might have had the right to tax banks, and the Chief Justice stated the objection which was raised on this admission in the following terms:— " It has also been insisted, as the power of tax- " ation in the general and State Government is acknow- " ledged to be concurrent, every argument which would " sustain the right of the general government to tax banks " chartered by the States, will equally sustain the right " of the States to tax banks chartered by the general " government. But," he replies, " the two cases are not " on the same reason. The people of all the States have " created the general government, and have conferred " upon it the general power of taxation. The people of " all the States, and the States themselves, are repre- " sented in Congress; and, by their representatives, exer- " cise this power. When they tax the chartered institu- " tions of the States, they tax their constituents; and " these taxes must be uniform, (and consequently " indirect.) But when a State taxes the operations of the " Government of the United States, it acts upon institu- " tions created, not by their own constituents, but by " people over whom they claim no control. It acts upon " the measures of a government created by others as well " as themselves. The difference is that which always " exists and always must exist between the action of the " whole on a part and the action of a part on the whole... ' But if the full application of this argument could be ad- "' mitted, it might bring into question the right of Congress " to tax the State banks, and could not prove the right of " the States to tax the Bank of the United States." (4, Wheaton, 435).

This point came up in 1879 in the case Venzie bank *vs.* Fenno, to know whether Congress had the right to tax the State Banks. The tax imposed by Congress was a tax on the circulation of the State banks—so much per cent, on the amount of the notes. This tax was attacked for two reasons, 1st. Because it was a direct tax, and that it had not been apportionned among the States according to the Constitution. 2nd. Because the tax impaired a franchise granted by the State, and that Congress had no power to pass a law which could do that. It was decided on the first point, that this was an indirect tax, and that under the Constitution there were no direct taxes other than the capitation tax and the tax on property. (8 Wallace, 540 *et seq.* Chase, C. J.)

The Chief Justice puts the following question :—" Is it " a tax on franchise granted by a State which Congress, " upon any principle exempting the reserved powers of " the States from impairment by taxation, must be held " to have no authority to lay and collect? We do not say " that there may not be such a tax. It may be admitted " that the reserved rights of the States, such as the right " to pass laws,.....to employ all necessary agencies for " legitimate purposes of State government, are not pro- " per subjects of the taxing power of Congress. But it can- " not be admited that franchises granted by a State are " necessaaily exempt from taxation; for franchises are " property, often very valuable and productive property; " and when not conferred for the purpose of giving effect " to some *reserved power* of a State, seem to be as properly " objects of taxation as any other property. But in the " case before us the object of taxation is not the fran- " chise of the bank, but property created, or contracts " made and issued under the franchise or power to issue " bank bills." (8 Wallace, p. 547.) But the opinion of the Court, notwithstanding these incidental remarks, was based on the fact that Congress having issued national notes, had in virtue of its supreme power, the right to

protect their circulation by imposing a tax on the circulation of the State banks; and if it had not an affirmative and delegated power to impose this tax, it had it as an incident to its uncontested power of supplying a paper currency. Two of the Judges (Nelson and Davis) dissented from this opinion, and Judge Nelson, after having stated that the State banks have always been recognized as having a legal existence, expresses himself as follows: —"The imposition upon banks cannot be upheld as a "tax upon property, neither could it have been so intended. It is, simply a mode by which the powers or faculties of the States to iucorporate banks are subjected to "taxation, and which, if maintainable, may *annihilate* "those powers. No person questions the authority of "Congress to tax the property of the banks, and of all "corporate bodies of a State, the same as that of individuals. A tax, upon this property, and which by the "Constitution is to be *uniform*, affords full scope to the "taxing powers of the Federal Government, and is consistent with the power of the States to create banks, "and, in our judgment, is the only subject of taxation by "this Government, to which these institutions are liable. "As we have seen, in the forepart of this opinion, the "power to incorporate banks was not surrendered to the "Federal Government but reserved to the States; and it "follows that the Constitution itself protects them or "should protect them from any encroachment upon this "right. As to the powers thus reserved, the States are as "supreme as before they entered the Union, and are "entitled to the unrestrained exercise of them. This taxation of the powers and faculties of the State Government, "which are essential to their sovereignty and to the efficient and independent management and administration "of their internal affairs, is, for the first time advanced "as an attribute of Federal authority." With how much greater force can these arguments and these opinions be applied to the present case? The power to incorporate

banks not only has been assigned to the Federal Government, but has been assigned to it exclusively, and denied and prohibited to the provincial legislatures. And even according to the opinion of Chief Justice Chase, who holds that Congress may tax the franchise of a corporation created by a State—he admits it with this qualification, this restriction—that the charter was not given for the purpose of giving effect to some reserved power of the State! "When not conferred for the "purpose of giving effect to some reserved power of the State." Then, if the charter was given for the purpose of giving effect to some reserved power, Chief Justice Chase was of the opinion that the tax imposed on such a corporation would have been unconstitutional. Now, in the case before us, the tax is imposed on a corporation whose existence and privileges are clearly and eminently under the control of the powers reserved to the Federal Government. The conclusion, then, is unavoidable.

I have searched in vain in the reports of the United States for a case in which the States have taxed the operations of a corporation created by Congress. The case of the Bank of the United States (*in re* McCulloch and *in re* Osborn) is the only one which can appear analogous — but it is remembered that this bank was considered as a branch of the Government—as a means employed by the Government itself for public and national purposes. "The tax was held to be repugnant to the "Constitution as being imposed directly upon an opera-"tion or an instrument of the Government." But we cannot apply this doctrine, unless we consider, what is perhaps true, that our banks are in their creation and purpose similar to the Bank of the United States and the National Banks.

The only cause which presents any similarity to that with which we are now engaged is the case of the Union Pacific Co. *vs.* Peniston. In this case the question raised concerned a tax imposed by a State Legislature on the pro

perty of the Union Pacific Railroad Co., a corporation created by Congress. It will be observed that the power to incorporate railroad companies is not assigned exclusively to Congress, and that the tax was imposed only on the property of the corporation and not on its franchise or its operations. Judge Strong, in the course of his judgment, referred to the cases of McCulloch *vs.* Maryland, and Osborn *vs.* U. S. Bank. We know that in the former of these cases the tax was imposed by the State of Maryland on each note put in circulation and in the latter the tax imposed by the State of Ohio was one of $50,000 on each office which the bank should open within the limits of the State. And Judge Strong sets forth in the following terms the effect of these taxes: "In the case of McCulloch the tax held unconstitutional "was laid upon the notes of the bank. The institution "was prohibited from issuing notes at all, except upon "stamped paper furnished by the State. The tax was, "therefore, not upon any property of the bank, but upon "one of its operations, in fact, upon its right to exist as "created. It was a direc impediment in the way of "a governmental operation performed through the bank "as an agent.....No wonder, then, that it was held "illegal.....In Osborn *vs.* U. S. Bank, the tax held as "unconstitutional was a tax upon the existence of the "bank, upon its right to transact business within the "State of Ohio." The reason of the decision is based on the difference which exists "between a tax upon the pro-"perty of the bank and one upon its action." In the first case the tax is legal and it is illegal in the second. The effect of this decision is circumscribed by these limits: "It does not extend to a tax imposed on the real property of the bank, in common with the other property in the State.....in common with the other property of the same description throughout the State." (18 Wallace, p. 34 and 35; 4 Wheaton, p. 436, Opinion of Marshall, C. J. 2 Peters, p. 462.)

Under our Constitutional Act the Federal Government has the exclusive power to legislate concerning currency and the issuing of paper money. (B. N. A. Act, sec. 91. Sec. 14 and 15), and if this Government sees fit to create these banks for the purpose of putting this power in execution, and does so, it seems to me necessary to come to the conclusion that the operation of our banks, as well as their franchise should be like those of the Bank of the United States and those of the National Banks in the United States—excepted from taxes which the Province might wish to impose upon them. The Bank of the United States, though created by Congress for a public purpose, was, notwithstanding, more or less a private corporation. The state owned only a fifth of the capital and the balance was owned by citizens. Though Chief Justice Marshall, in the case of Osborne says : The bank has not been originated for the management of an individual concern, having private trade and private profit for its great and principal object. " The bank is not considered as a private corporation whose principal object is individual trade and individual profit; but as a public corporation created for public and national purposes. The Bank was not created for its own sake, or for private purposes. It has never been supposed that Congress could create such a corporation." (9 Wheaton, p. 859 and 860.) Judge Strong, however, in the cases of " Legal Tender," says : " The Corporation (U. S. Bank) was a private one, doing business for its own profit." (12 Wallace, p. 537.) Whatever there may be in this question, the Bank of the United States carried on a private banking business, and the Supreme Court has decided in these cases that its private business was exempt from taxes, as well as its operations as agent of the Federal Government.

" If the trade of the bank," says C. J. Marshall, " be essential to its character, as a machine for the fiscal operations of the Government, that trade must be as exempt from State control as the actual conveyance of the public

money. Indeed, a tax bears upon the whole machine; as well upon the faculty of collecting and transmitting the money of the nation as on that of discounting the notes of individuals. No discounting is taken between them." (9 Wheaton, p. 867.)

These principles and these reasonings can be applied with quite as much force to the case now before us, for the tax is imposed on the bank, consequently on its faculty of circulating Dominion notes, and more than that, this tax infringes upon the exclusive power of the Federal Government to cause these notes to be circulated, and this tax is, moreover, imposed upon the privilege accorded to the banks by the Federal Government of opening offices in parts of the Dominion. It is thus a tax upon the Federal power, and Judge Strong, speaking in the name of the Court, in the case of Pacific *vs.* Penniston, adds, " It is therefore manifest that exemptions of Federal " agencies from State taxation is dependent, not upon the " nature of the agents or upon the mode of their constitu- " tion, or upon the fact that they are agents, but upon " the effect of the tax. That is, upon the question whet- " her the tax does in truth deprive them of power to " serve the Government as they were intended to serve it, " or does hinder the efficient exercise of their power. " A tax upon their property has no such necessary effect. " It leaves them free to discharge the duties they have " undertaken to perform. A tax upon their operations is " a direct obstruction to the exercise of Federal powers. " In this case the tax is laid upon the property of the " railroad company. It is not imposed on the franchise " or the right of the company to exist and perform the " function for which it was brought into being. Nor is it " laid upon any act which the company has been author- " ised to do." (18 Wallace, p. 36 and 37.) However, Judges Bradley and Field have held a different opinion. They have likened the Union Pacific R.R. Company to the Bank of the United States and to the National Banks,

and they have looked on it as a corporation created by Congress for a national or public end. And Judge Bradley, replying to the objection, that having admitted (what is true) that a tax might be imposed on the immoveable property of the Bank of the United States, we must admit the same principle with regard to the properties of the Union Pacific R.R. Company, says: "The taxes (on the " Bank of the U. S.) were declared unconstitutional and " void. They impeded the operations of the bank as a " financial agent. Real estate was not a necessary appur- " tenant to the exercise of the functions of the bank. It " might hire rooms for its office, or it might purchase or " erect building. But the primary object of a railroad " company is commerce and transportation. In its case " a railway track is just as essential to its operations as " the use of a currency or the issue or purchase of bills " of exchange is to the operations of a bank. To tax the " road is to tax the very instrumentality which Congress " desired to established, and to operate which it created " the corporatiou." (18 Wallace, p. 49.) If the tax had been imposed on the franchise of the company, on its operations, upon the acts or transactions which it was by Congress authorised to perform, the Court would have declared this tax unconstitutional, and it must, in like manner, be so, and with greater reason, in the case which now engages our attention, for the right to regulate banks and their incorporation is exclusively reserved to our Federal Government, while in the United States the right to incorporate railroad companies is not given, even nominally, to Congress. We have in our own country a decison on which certain principles are enunciated which may, I think, be applied perfectly to the present case and by means of which we can arrive at a logical conclusion. I refer to the judgment of the Supreme Court on the question of the tax imposed on brewers; Severn *vs.* The Queen, 2 S. C. R. 70. In this case it was a question of license, and the decision of the Supreme Court was based princi-

pally on the ground that the local legislatures had no right to impose licenses except in the cases mentioned in par. 9 of sec. 92 of the B. N. A. Act, and cases of the same nature. But there can be no doubt, from the opinions of the judges, that a tax imposed on the occupation of a brewer or distiller, on his operations as such, would also have been declared unconstitutional as an infringement of the right of the Federal Government to regulate trade and commerce. And if this be, as in the case of a tax on a brewer or distiller, how much more in the case of a tax on a bank.

Lastly, what would be the consequence, if the constitutionality of this Act as to banks were admitted? It is undeniable that if the provincial legislatures have the right to impose the tax in question, their power is without limit, and if one provincial legislature possesses it all do. If, then, the Legislature of this Province has the constitutional power to impose a tax of $1000 on the capital of each bank and of $100 on each office, what is to prevent it from following the example of the State of Ohio, in 1819, as to the Bank of the United States and imposing an annual tax of $50,000 on each office which a bank might establish. And if this Province has a right then each of the seven Provinces which constitute the Dominions has the same right. And, mereover, the banks already pay indirectly to the Dominion Government a tax on their franchise, in respect of the restriction which the Federal Government has imposed on their operations, by prohibiting the issue of notes less than $5.00, and the obligation of their reserve in Dominion notes.

To sum up, I am of opinion:

1st. That the tax is indirect.

2nd. That, if it were direct, it is not imposed within the Province.

3rd. That, if it be direct and imposed within the Provinte, it is an encroachment on the power of the Federal Government to regulate banks and the incorporation of

banks. And, conquently, the law is, as to the Defendants, *ultra vires*, and unconstitutional. The action is dismissed.

TEXTE DU JUGEMENT DU JUGE RAINVILLE.

La cour, après avoir entendu les parties, par leurs avocats, contradictoirement sur le mérite de cette cause ; examiné la procédure et les pièces produites, et avoir délibéré :

Attendu que le demandeur, en sa qualité d'inspecteur de licences pour le district de revenu de Montréal, réclame, pour et de la part de Sa Majesté, la somme de dix-huit cents piastres étant pour taxes imposées sur la défenderesse, en vertu de l'acte de la législature de Québec, 45 Vict., chap. 22 ;

Attendu que le demandeur allègue que la défenderesse est une banque incorporée ; qu'elle a un capital de six millions de piastres, qu'elle fait des affaires de banque dans les limites de la province de Québec, et qu'elle a un bureau d'affaires en la cité de Montréal ;

Attendu que la défenderesse plaide que la plus grande partie de son capital payé de six millions de piastres, appartient à des actionnaires résidant en dehors des limites de la province de Québec ; que la taxe imposée et réclamée est illégale et inconstitutionnelle, et que la législature de la province de Québec n'avait pas le droit de l'imposer :

1° Parcequ'elle n'est pas une taxe directe ;

2° Parcequ'elle n'est pas imposée dans les limites de la province de Québec ;

3° Parcequ'elle est un empiètement sur les droits du parlement fédéral de régler le commerce et le trafic et les banques et l'incorporation des banques ;

Considérant que les faits allégués de part et d'autre sont admis par les parties, par une admsssion signée par elles ;

Considérant que la taxe réclamée est imposée sur le

droit corporatif (franchise) et leur privilège de transiger des affaires dans la province de Québec, et non sur leur propriété ;

Considérant que par la loi, les banques ont, en ce pays, le monopole de faire des affaires de banque, et que la dite taxe devra toujours être supportée en définitive par le public, et qu'en conséquence elle est indirecte ;

Considérant que la dite taxe sera supportée, en définitive, par des personnes non résidentes en cette province, et que le droit corporatif (franchise) n'est pas situé en entier dans cette province, et qu'en conséquence la dite taxe n'est pas imposée dans les limites de cette province ;

Considérant que, par l'Acte de l'Amérique Britannique du Nord, le pouvoir exclusif de régler les banques et l'incorporation des banques est attribué au parlement fédéral ;

Considérant que le dit parlement a exercé ses pouvoirs à cet égard ; qu'il a créé la défenderesse et lui a permis d'établir des bureaux ou places d'affaires dans toutes places quelconque, dans les limites de la puissance ;

Considérant que les législatures provinciales n'ont le droit de taxer directement que ce qui existe par leur autorité, ou est introduit par leur permission ;

Considérant que les banques ne sont ni créées par leur autorité, ni introduites dans cette province par leur permission ;

Considérant que le pouvoir de taxer des législatures provinciales est illimité dans leur sphère ;

Considérant que si le pouvoir de taxer les banques leur était reconnu, elles auraient droit de les taxer de manière à les faire disparaître et à annihiler les pouvoirs exclusifs du parlement fédéral, et qu'en conséquence la dite taxe est un empiètement sur les droits du parlement fédéral de régler les banques et l'incorparation des banques ;

Maintient l'exception plaidée par la défenderesse, déclare, quant à elle, la dite loi *ultra vires*, et déboute le demandeur *ès-qualité* de son action :

Et la Cour recommande que les frais et dépens de la défense soient payés à la défenderesse.

L'Intimé, *The Canadian Bank of Commerce*, ajoutait dans son *factum*, devant la Cour du Banc de la Reine en appel, les remarques qui suivent :

In the foregoing remarks, the Hon. Mr. Justice Rainville has gone so fully into the whole question that little remains to be said.

The question here being as to the power of the Quebec Legislature to pass the Act in question, we must look to the British North America Act which created that Legislature, for its authority, and particularly to section 92, according to the rule of construction laid down by the Privy Council, in the Citizens Insurance Company *vs.* Parsons (L. R. 7 App. cases 109), and adopted in Dobie *vs.* The Temporalities Board (do. p. 149), and also in Russell *vs.* The Queen (do. p. 836), " The first question to be deci-
" ded is, whether the Act impeached in the present
" appeals falls within any of the classes of subjects enume-
" rated in sec. 92, and assigned exclusively to the Legis-
" latures of the Provinces ; for, if it does not, it can be of
" no validity, and no other question would then arise. I
" is only when an Act of the Provincial Legislature
" *prima facie* falls within one of these classes of subjects
" that the further questions arise, viz., whether, notwith-
" standing this is so, the subject of the Act does not also
" fall within one of the enumerated classes of subjects in
" sec. 91, and whether the power of the Provincial Legis-
" lature is or is not thereby overborne."

Appellant must therefore find explicit authority for the tax in section 92. It is not pretended that it is a license or falls under sub-section 9, relating to " Shop, Saloon, Tavern, Auctioneer, and other Licenses." It has indeed more analogy to a " license " than to a " direct tax", but if this pretention were urged it would no doubt be held invalid for the reasons given in the Superior Court, and

in this Court, in the ease of Angers *vs.* The Queen Insuranre Company, and in the Courts of Ontario and the Supreme Court in the case of Severn *vs.* The Queen (2 S. C. R. 70). The expression " other licences " would no doubt be held not to cover licenses to Banks any more than to Insurance Companies, or to Brewers in the cases just referred to. Although the present tax when first introduced into the Legislature was called a " license " ; yet when the title of the Act was changed to " An Act to impose certain Direct Taxes on certain Commercial Corparations " it was no doubt intended to rely upou subsection 2 of section 92 which authorizes them to impose " Direct Taxation within the Province in order to the raising of a Revenue for Provincial purposes."

Now, while there is considerable difference of opinion as to what is *direct* taxation and what *indirect*, it is respectfully submitted that according to all the recognized definitions the present tax would be classed as indirect. This is true only of the decisions of the United States courts where the meaning of the words " direct taxes " have a restricted meaning, on account of the clauses of the U. S. Constitution above referred to, but it is true of the definitions given by the standard writers on political eco nomy and taxation on both continents.

Nearly all the writers upon the subject adopt one or other of two test that are very concisely put by Mill and McCulloch respectively. *Mill* says in his *Political Economy*, book 5, ch. 3, on direct taxes :—" Taxes are either direct or indirect. A direct tax is one which is demanded from the very persons who it is intended or desired should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another."

McCulloch on Taxation, p. 1, says :—" A tax may be either direct or indirect. It is said to be *direct* when it is taken directly from property or income ; and *indirect* when it is taken from them by making individuals pay

for liberty to use certain articles or to exercise certain privileges."

One or other of these tests is substantially given by the following authorities :—

Fawcett's Political Economy, ch. 3, p. 547.
Jevons' do p. 127.
Newman's do p. 215.
Encyclopeadia Britannica, Vo Taxation.
Traité d'Economie Politique, par J. B. Say, p. 516, ch. X.
Cours d'Economie Politique, do vol. 2, p. 401.
American Political Economy, Prof. Bowen, p. 436.
Elements of Political Economy, Prof. Perry, p. 585.
Political Economy, Horace Greeley, ch. 40.
Burroughs, on Taxation, p. 1, § 3.

And inasmuch as Banking is by the Banking Acts of 1871 (33 Vict., ch. 5), and 1880 (43 Vict., ch. 22), limited to Incorporated Banks, it follows that they can, and as a matter of course will, make their customers recoup them for this tax just ascertainly as a merchant or manufacturer would collect from his customer the customs or excise duties paid by him, and the tax would be indirect according to the definition of Mill. As the tax is an attempt to make the Bank pay " for liberty to excise certain privileges " namely, to do business in this Province, it is clearly indirect under the definition of McCulloch.

Hilliard on Taxation says, p. 57: " Direct taxes are not taxes upon personal property, contracts, *occupations*, and the like." To the same effect, Venzie Bank *vs.* Fenno, 8 Wallace, p. 533 ; Glasgow *vs.* Rouse, 43 Mo. 479 ; and Turner *vs.* Smith, 14 Wallace, p. 533.

American authorities are of special value as the expression " direct taxation " in sec. 92 of the B. N. A. Act is taken from the Quebec Resolutions (No. 43) and no doubt was inserted in the latter from the United States Constitution.

Fawcett, in his Political Economy, shows how " a tax which is in its essential nature direct may become indi-

rect by private and commercial arrangements and by many other causes"; and Macdonell, in his Survey of Political Economy, p. 350, note, shows how even the income tax becomes indirect, for instance when the Bank of England pays the fundholders' income tax, "just as the tobacco manufacturers" he adds "pay the tobacco tax of smokers."

It has been held (Bank of Commerce *vs.* New York City, 2 Black, 620) that a tax on the nominal capital of a Bank (which is the case now in question), is a tax on the *franchise* and not upon the property, and Counsel for Appellant took this ground in the Court below. Burroughs speaking of "Tax on the Franchise," p. 166, says:— "This tax is, in its essential nature, the same as the *license* tax." Now all the authorities agree that a *license* is an indirect tax. Burroughs goes on to say: "In the case of a foreign corporation, the bonus or tax is the amount paid for the privilege of exercising the corporate powers in the State." Cooley, on Taxation, p. 25, says: "A tax on a corporate franchise may or may not be just or politic. If the business is one of which the corporation have a monopoly, a tax on their franchises however heavy, would not be burdensome, because the result would only be to add to the cost of whatever the corporations supplied to the public, so that the tax would really be paid by the community at large."

In the case of the Portland Bank *vs.* Apthorp (12 Mass. p. 252) it was held that an act imposing a tax of one per cent on the paid up capital stock of Banks was not authorized by the clause of the constitution empowering the Legislature "to impose and levy proportionate and reasonable assess-"ments, rates and taxes upon all the inhabitants of, and "persons residents and estates lying within the Com-"monwealth"; but that it came under the provision giving the right "to impose and levy reasonable duties "and excises upon any produce, goods, wares, marchan-"dise and commodities whatsoever brought into, produ-"ced, manufactured or being within the same." The

word " commodities " here was held by Parker C. J. p. 256) to include convenience, privilege, or employment, and that the Government had the same right to impose the excise or duty on the capital stock of the bank as they would have to exact an excise or licence fee from innkeepers, auctioneers &c.—This was followed and approved in the Commonwealth *vs.* The People's Bank, (5 Allen p. 429) when Bigelow C. J. said (p. 431). " As an excise on the privilege or franchise belonging to the Defendants, it would come within the case of Portland Bank *vs.* Apthorp, 12 Mass. 252, a decision which has long been acquiesced in, and the reasoning and conclusion of which we see no ground to deny or call in question." And on page 435: " A tax imposed on the franchise of a corporation, the power and authority of which is thus limited to holding, managing, and investing property for the use and benefit of those who deposit their money in its keeping * * * necessarily operates as an *indirect* assessment on those for whose use and benefit its corporate rights and privileges are granted and exercised."

But even if the tax in question were a direct tax, it would not be authorized by section 92, s. s. 2, as not being direct taxation " *within the province.*" If the tax on the Bank of Commerce be looked upon as a tax on the Corporation considered as an artificial person, and apart from its shareholders, the capital stock of the Bank now sought to be taxed would be taxable only at Toronto, where its head office is situate where are its domicile and residence, and where mereover it is admitted that two-thirds of said capital is employed. If on the other hand the capital sought to be taxed be looked upon as belonging to the shareholders it is not " within the Province," for it is admitted that the greater part of the stock belongs to persons not residing within the Province.

Burroughs says (p. 186) : A corporation is taxable for its personal property at its domicile, which is the State of its

creation, and within that State, in the town where it has its principal place of business." Angell and Ames § 458. — " The general rule appears to be clearly, that in regard to public taxes, every person is liable to be assessed for his personal property in the State of which he is an inhabitant; and stock owned in incorporated banks &c. by non resident holders thereof, is not subject to the taxing power of the State."—Corporations are to be taxed on personality at the place of their principal office " (Western T. Co. *v.* Scheu, 19 N. Y. 408.)

The singling out of certain commercial corporations for taxation, while individuals and firms engaged in the same business are not taxed, is, properly speaking, not taxation at all within the meaning of the B. N. A. Act. The word was no doubt used in the ordinary acception of the term, and such an unjust exaction as that now sought to be imposed could not have been intended.

Voici le texte du jugement de la Cour d'Appel, dans les causes jugées par le Juge Rainville :

Considering that the taxes complained of in this case, were and are imposed by an Act of the Legislature of the Province of Quebec, passed in the 45th year of Her Majesty's reign, and being numbered chapter 22 of the Statutes of the said year ;

And considering that the said Legislature had power to impose the said duties ; in asmuch as the said taxes are direct taxes, within the Province, and were imposed in order to raise a revenue for Provincial purposes.

And considering further more that, even assuming the said taxes should be considered as not falling within the denomination of direct taxes, the said Legislature had power to impose the same, in asmuch as the said taxes are matters of a merely local or private nature in the Province.

And considering therefore that there is error, in the judgment rendered by the Superior Court, sitting at Montreal, on the Twelfth, day of may, one thousand eigh

hundred and eighty-three, doth reverse, annul and set aside the said judgment, of the 12th day of may, 1883 and proceeding to render the judgment which the said Court of original juridiction ought to have rendered, doth condemn the said Defendants now Respondents, to pay to the Plaintiff, Appelant, *ès-qualité*, the sum of eighteen hundred dollars with interest from the third day of July 1882.

And doth, condemn the said Respondents to pay the said Appelant, *ès-qualité*, the costs by him incurred, as well in this Court as in the Court below (1).

Voici maintenant les remarques des Juges de la Cour d'Appel, en rendant les jugements dans ces causes :

Sir A. A. Dorion, J. en C. :

Nine cases have been submitted to us, in order to test the legality of taxes imposed by an act passed by the Legislature of the Province of Quebec, in the 45th year of Her Majesty's Reign, under Ch. 22, and entitled. " *An* " *Act to impose certain direct taxes on certain commercial* " *corporations.*"

(1) Voici la liste des causes qui ont été jugées, et dans lesquelles ces questions des taxes furent décidées : Jugements rendus en Cour Supérieure, à Montréal, par l'honorable Juge Rainville, le 12 mai 1883, dans les causes de *William B. Lambe*, ès-qualité, vs. *La Banque de Toronto, William B. Lambe*, ès-qualité, vs. *La Banque des Marchands du Canada, William B. Lambe*, ès-qualité, vs. *La Banque d'Ontario, William B. Lambe*, ès-qualité, vs. *La Banque Molson*, et *William B. Lambe*, ès-qualité, vs. *The Canadian Bank of Commerce*, déclarant le Statut de Québec, 45 Vict., ch. 22, intitulé : " Acte pour imposer certaines taxes directes sur certaines corporations commerciales," inconstitutionnel ; par l'honorable Juge Jetté, le 23 mai 1884, dans la cause de *William B. Lambe*, es-qualité, vs. *The North British & Mercantile Fire Insurance Co.* ; par l'honarable Juge Mathieu, le 7 mai 1884, dans les causes de *William B. Lambe*, ès-qualité, vs. *The Export Lumber Company, William B. Lambe*, ès-qualité, vs. *The Ogdensburg Coal & Forwarding Company, William B, Lambe*, ès-qualité, vs. *The Williams Manufacturing Company*, déclarant cet acte inconstitutionnel, et par la Cour du Banc de la Reine, en Appel, à Montréal, le 23 janvier 1885, Dorion, J. en C. (dissident), Ramsay, J., Tessier, J., Cross, J. (dissident), et Baby, J., confirmant les jugements des juges Jetté et Mathieu, et renversant les jugements du Juge Rainville, et déclarant que la Législature Provinciale a le droit d'imposer des taxes directes et indirectes, dans la province, pour des fins provinciales.

The first section of this act which imposes the taxes claimed by these several actions, is in the following terms :

I. " In order to provide for the exigencies of the public " service of this province, every Bank carrying on the " business of Banking in this province, every Insurance " Company accepting risks and transacting the business " of insurance in this province, every incorporated " company carrying on any labour, trade or business in " this province, every incorporate Loan Company ma- " king loans in this province, every incorporated Navi- " gation Company running a regular line of steamers, " steamboats or other vessels in the waters of this pro- " vince; every Telegraph Company working a telegraph " line or part of a telegraph line in this province; every " Telephone Company working a telephone line in this " province; every City Passenger Railway or Tramway " Company working a line of railway or tramway in " this province, shall annually pay the several taxes men- " tioned and specified in section three of this Act, which " taxes are hereby imposed upon each of such commer- " cial corporations respectively ".....

Section 3 says, " the annual taxes imposed upon and payable by the commercial corporations mentioned in section 1, shall be, on banks * * * $1,000 when the paid up capital is from $500,000 to $1,000,000, and an additionnal snm of $200 for each million or fraction of a million dollars of the paid up capital, from one million to three million dollars, and a further additional sum of $100, for each million or fraction of a million dollars of the paid up capital over $3,000,000, and an additional tax of $100, upon each office in the cities of Montreal and Quebec, and $20 for each office in any other place"

By the subsequent provisions of this Act these taxes are payable annually, and the recovery can be made on behalf of Her Majesty, and by Section 10, these taxes are

to form part of the consolidated revenue of the Province. Of the nine cases under consideration which have all been instituted by the Revenue Inspector for the District of Montreal, five are against Banks, and the others are against an insurance Company, a manufacturing Company, a Railway and Navigation Company, and the ninth against a navigation company. Of these, six were incorporated either by the Dominion parliament, or before the passing of the British North America Act, 1867, one was incorporated in England, and two in the United States. Three have their principal office in the Province of Quebec, and the others have their principal office out of the Province, but they are all doing business in the Province of Quebec. The stock in three of the companies is held by parties residing out of the Province, and, in the others, by parties a portion of whom reside in the province, while the other portion reside out of the province.

In the five bank cases, the actions have been dismissed by Mr. Justice Rainville, and in the four others, they have been maintained by Mr. Justice Jetté and Mr. Justice Mathieu.

These nine cases form part of a larger number of cases now pending against other corporations, for the recovery of similiar taxes, and have been represented, at the hearing, as indicating the different classes into which the whole of the cases may be divided, according to the special circumstances of each case.

I may, at once, say that I do not find that these special circumstances are such as to take any of the cases out of the rule which I think is applicable to all of them.

The question, and the only question to be decided, as stated in the admissions given in several of these cases is, whether or not, the provincial legislature had authority to pass the act *45th Vict. c.* 22, and to impose the taxes sought to be recovered.

Mr. Justice Rainville, relying principally on arguments drawn from the decisions rendered in the United States, has

ruled, in the five bank cases, that the present tax was not a direct tax, within the meaning of the *British North America Act*, 1867, that the provincial legislature has no authority to impose such a tax, and as a consequence he has dismissed the five actions.

Mr. Justice Jetté and Mr. Justice Mathieu, rejecting the authority of American decisions, as inapplicable to the present cases, in as much as the words "*direct taxes*" in the American Constitution are controled and limited in their application by the obligation imposed upon Congress to apportion such "*direct taxes*" in proportion to the census, and relying principally on the opinions expressed by French writers on political economy, have come to an opposite conclusion, and declared that the Legislature in imposing the present tax had acted within the limits of its authority.

Now, without rejecting, altogether, the assistance which may be derived from a careful examination of the decisions rendered on this question of direct taxation by the eminent jurists who, sitting in the Supreme Court of the United States, have had to give an interpretation to those words, as found in the constitution of their Country, nor the valuable opinions expressed by political economists, as to the meaning of those words, I do not think that either of those standards is a satisfactory one in the present cases. It cannot be denied that the words "direct taxes" in the Constitution of the United States cannot apply to some of the taxes which are elsewhere considered as direct taxes, and that they were therefore used in a limited sense in the Constitution of the United States.

Chief Justice Chase, in the case of Venzie Bank vs Fenno, (8 Wallace, 553) after a careful review of the judicial decisions and of the opinions of jurists and others, came to the following conclusion: "It may be rightly affirmed, "therefore, that in the practical construction of the "Constitution by Congress, direct taxes have been limited "to taxes on *land* and appurtenances, and taxes on polls

" or Capitation taxes." And the same learned judge further says :—" It may be safely assumed, therefore, as the " unanimous judgment of the Court, that a tax on " carriages is not a direct tax. And it may further be " taken as established upon the testimony of Paterson, " that the words 'direct taxes,' as used in the constitution, " comprehended only capitation taxes and taxes on land, " and perhaps taxes on personal property by general " valuation and assessment of the various descriptions " possessed within the several States." (8 Wallace, p. 546.)

Judge Cooley, on Taxation, p. 5, *note* 2, also says : "The " term direct taxation is employed in a peculiar sense in " the Constitution, in the provision requiring such taxes " to be apportioned according to representation, and they " are, perhaps, limited to capitation and land taxes ; " and Kent, vol. 1st, p. 255, says : " The Constitution contem- " plated no taxes as direct taxes, but such as Congress " could lay in proportion to the census."

On the other hand there is a great diversity of opinion among jurists and writers on political economy, not only as to what taxes are to be considered as direct taxes, but even as to the difinition of what constitutes a direct tax.

Merlin, Répertoire vs Contributions Publiques, §1,says : " Les contributions indirectes sont, suivant la définition " *qu'en donne la loi, en forme d'instruction, du* 8 *janvier* " 1790, *tous les impôts assis sur la fabrication, la vente, le* " *transport et l'introduction de plusieurs objets de commerce* " *et de consommation, impôt dont le produit ordinairement* " *avancé par le fabricant, le marchand, ou le voiturier est* " *supporté et indirectement payé par le consommateur.*

" D'après cette définition les droits d'enregistrement (the droits d'enregistrement include and are chiefly composed of the duties levied on the conveyance of real estate, whether by inheritance or otherwise) " ne devraient pas " être considérés comme des impositions indirectes, cepen- " dant *on s'est habitué à les ranger dans cette classe.*"

" C'est aussi à cette classe qu'appartiennent les droits " de douane, les droits sur le tabac, sur les cartes à jouer, " sur le sel, sur les boissons, etc."

Say, Traité d'Economie Politique, p. 521, has the following passage :—" On peut ranger sous deux chefs princi- " paux les différentes manières qu'on emploie pour " atteindre les revenus des contribuables. Ou bien on leur " demande directement une portion du revenu qu'on leur " suppose ; c'est l'objet des contributions directes ; ou " bien on leur fait payer une somme quelconque sur cer- " taines consommations qu'ils font avec leur revenu : " c'est l'objet de ce que l'on nomme en France les contri- " butions indirectes."

This writer places among the direct taxes " *la contribution foncière, la contribution mobilière et les patentes*," and among the contribution indirecte, " les droits de douane, " l'octroi, les billets de spectacles, le timbre des journaux " les droits sur la vente du tabac, le transport des lettres " par la poste, le timbre," and he says: " toutes ces ma- " nières de lever les contributions les rangeut dans la " classe des contributions indirectes, parce que la de- " mande n'en est pas faite à personne directement mais " au produit, à la marchandise frappée de l'impôt " and in a note, he adds; " Et non parcequ'elles atteignent " indirectement le contribuable; *car si elles tiraient* " *leur dénomination de cette dernière circonstance, il fau-* " *drait donner le même nom à des contributions très directes,* " *comme par exemple à l'impôt des patentes* qui tombe en " partie indirectement sur le consommateur des produits " dont s'occupe le patenté."

" La patente, says, de Gérando, Droit administratif, " vol. 4, p. 42, confère le droit d'exercer librement une " branche d'industrie, (*Loi des* 2-17 *mars* 1791).

At p 129, the same writer says; " La license a quel- " qu'analogie avec la patente, elle s'applique à la profes- " sion exercée."

" Elle correspond à la déclaration de celui qui exerce; " elle la constate."

" La déclaration a pour objet de faire connaître à l'ad-
" ministration ceux qui exercent une profession spéciale-
" ment soumise à la surveillance.

" Elle est exigée des débitants de boissons, des mar-
" chands de gros, des brasseurs, distillateurs et bouilleurs
" de profession."

This writer places the droits de *patentes* among the contributions directes, and the droits de *licences* among the contributions indirectes, (pp. 5 et 42 and pp. 100 et 129.)

Leroy-Beaulieu, Traité de la Science des Finances, Vol. I, p. 214, after showing that the definition of direct and indirect taxes is not the same in every country, says ;

" Par *l'impôt direct* le législateur se propose d'atteindre
" immédiatement, du premier bond, et proportionnelle-
" ment à sa fortune ou à ses revenus, le véritable contri-
" buable ; il supprime tout intermédiaire entre lui et le
" fisc, et il cherche une proportionnalité rigoureuse de
" l'impôt à la fortune ou aux facultés."

" Par *l'impôt indirect* le législateur ne vise pas immé
" diatement le véritable contribuable, et ne cherche
" pas à lui imposer une charge strictement pro-
" portionnelle à ses facultés : il ne se propose d'atteindre
" le vrai contribuable que par ricochet, par contre-coup,
" par répercussion : il met des intermédiaires entre lui et
" le fisc, et renonce à une stricte proportionnalité de l'im-
" pôt dans les cas particuliers, se contentant d'une pro-
" tionnalité relative en général."

Passy, in the Dictionnaire de l'Economie Politique, *vo.* Impôt, says :

" C'est un usage reçu de diviser les impôts en deux
" catégories distinctes. On appelle *directs* ceux que les
" contribuables acquittent eux-mêmes pour leur propre
" compte ; on appelle *indirects* ceux dont certains d'entre
" eux ne font que l'avance et dont ils obtiennent le rem-
" boursement des mains d'autres personnes."

The test applied by these two writers to distinguish direct from indirect taxes is inconsistent with the definition given by Say. It is however substantially the same as that indicated by Merlin, as derived from the law of the 8th of January 1790, and by Mill, Principles of Political, Economy vol. 2, p. *lib.* 5, ch. 3, § 1, who says:

" Taxes are either *direct* or *indirect.* A *direct tax* is " one which is demanded from the very person who, *it* " *is intended or desired*, should pay it. *Indirect taxes* are " those which are demanded from one person, in the " expectation and intention that he shall indemnify him- " self at the expense of another, such are the *excise* or *custom.*"

And Walker—*Science of Wealth* p. 338. says:

" *A direct tax* is demanded of the person who, it is " intended, shall pay it. *Indirect taxes* are demanded " from one person, in the expectation that he will indem- " nify himself at the expense of others."

" According to McCullock, *on taxation*, p. 1. A tax may " be either direct or indirect. It is said to be direct, " when taken directly from property or income, and indi- " rect when is is taken from them by making indivuduals " pay to use certain articles or to exercise certain privile- " ges. '

Under this last definition, the revenue raised by means of the licenses mentioned in sub sect. 9 of Sect. 92, of the Confederation Act, would, in England, be considered as the outcome of an indirect, while in France, it might be, considered as a patent tax, which is a direct tax, or a licence tax which is an indirect tax.

Mill, in the work already cited, Ch. 5, § 1, says: " Besides direct taxes on income, and taxes on consump- " tion, the financial systems of most countries comprise " a variety of miscellaneous imposts, not strictly included " in either class."

I do not wish to discuss here the comparative merits of these definitions and clascifications: My only object, in ma-

king the above citations, is to show that the expressions "*direct*" and "*indirect taxes*" in their legislative application are purely conventional terms, having a different meaning, according to the different legislation of each country in which they are used, and that, as legal terms, they have no common or scientific basis.

This could hardly be otherwise, since in every country new taxes or new modes of taxation, unknown in other countries, are constantly brought in operation and old or effete taxes are revived under new names and a new classification, so that it is almost impossible for foreign writers to follow the changes.

The old Aides and Gabelles which existed in France, before the Revolution, and were abolished by the *Assemblée Connstituante*, became, under the first Empire, the "*droits réunis;*" the "*droits réunis*" disappeared with the Empire, the taxes however were retained, at the Restoration, under the less obnoxious name of *contributions indirectes.*

In England, some of the stamp duties and even some of the taxes formerly known as assessed taxes, have, by recent statutes, been declared to be excise duties.

Stephens, Commentaries, Vol. 2, p. 567, speaking of excise, says, that in England, "its advantages indeed are "such that, under recent acts of Parliament, many imposts "have been classed (probably for greater convenience of "collection) under this head of duties which are not pro-"perly in the nature of excise. Such is the case with "regard to licenses which the law requires to be annually "taken out by those who manufacture or deal in certain "articles, or who follow certain employments."

This is very much the same language used by Merlin, as regards the *droits d'enregistrement,* when he says, they ought not to be considered as *impositions indirectes, cependant on s'est habitué à les ranger dans cette classe.* If such a change can be done by usage or custom, surely it can be effected by express legislation.

In the case of Springer vs. The United States, (102 United States' Rep., p. 597), the following passages of a brief prepared for the case of Hylton vs. The United States, by Hamilton, the distinguished statesman and jurist, is cited.

" What is the distinction between *direct* and *indirect* " *taxes.*—It is a matter of regret that terms so uncertain " and vague on a point so important, are to be found in " the constitution. We shall seek in vain, for any ante- " cedent settled legal meaning to the respective terms. " There are none. We shall be as much at a loss to find " any disposition of either which can satisfactorily deter- " mine the point."

And in the case of Venzie Bank *vs.* Fenno (8 Wallace, 553) to which I have already referred, Chief Justice Chase is reported to have said : " Much deversity of opinion has " always prevailed upon the question whose are taxes ? " Attempts to answer it by reference to the definitions of " political economists have been frequently made, but " without results. The enumeration of the different " kinds of taxes which Congress was authorised to impose " was probably made with little reference to their specu- " lations."

All this shows the difficulty of applying in every country, the same test or description to the words *direct* or *indirect taxes ;* and I think that the remarks of Chief Justice Chase are as applicable to the British North America Act as to the Constitution of the United States. We must therefore look elsewhere for a satisfactory interpretation of the meaning of the words *direct taxation,* as used in the British North America Act. We must first exhaust the ordinary rules of interpretation applicable to Statute Law, and seek in the act itself and in the different provisions relating to the power of taxation, what meaning the Imperial Parliament has attached to those words. We must also refer to the other acts passed by parliament on the same cognate subjects, to find how similar taxes

have been classified, and finally we must consider what effect the decisions already rendered by our higher courts, and by the Lords of the Privy Council, on the several questions of taxation which have come before them on the present cases. Should these enquiries fail to satisfy us, then we may have recourse to those more remote, and, I may add, less satisfactory sources of information, the United States dicisions and the opinion of political economists, not as authority, but as arguments and reasons emanating from eminent jurists and scientific men, whose views on such questions, are, undoubtedly, deserving of great consideration.

By referring to the British North America Act, we find that the third sub-sect. of section 91, gives to the Dominion Parliament the exclusive legislative authority for the raising of money by any mode or system of taxations. Section 102, provides that all duties and revenues over which the respective legislatures of the several provinces, at the time of the union, had power to appropriate, except such as are reserved to the respective legislatures, or are raised by them in accordance with the special powers conferred to them by the act, shall form one Consolidated Revenue fund to be appropriated for the public service of Canada, etc.

By sect. 121, all articles of the growth, produce or manufacture of any of the Provinces is to be admitted free in the other Provinces.

Section 122 places the customs and excise laws in force in each Province under the control of the Dominion Parliament, by providing that, *the customs and excise laws of each Province are to remain in force until altered by the Parliament of Canada.* Inter-provincial customs duties are abolished. By Section 123 and Section 124 is reserved to the Province of New Brunswick the right to levy certain existing export duty on lumber, but forbids their increase, and finally it is provided, by section 126, that those portions of duties and revenues reserved to the respective govern-

ments or legislatures of the Provinces, and *the duties raised by them, in accordance with the special powers conferred upon them, by the act, shall, in each Province, form the consolidated revenue of the Province.*

From these several provisions, it is clear that the whole of the duties and revenues of which, before the Union, each of the provinces could dispose, including *customs and excise duties*, have been transferred to the Dominion, together with the exclusive power to alter them, and to raise money, by any mode or system of taxation, except as regards such portions of those duties and revenues which are reserved to the provinces. And such other duties *as they may raise under the special powers conferred to them.*

The Provinces have therefore no power to deal with or to impose customs or excise duties, nor to raise any revenue whatsoever by taxation, unless the power and authority to do so has been specially conferred upon them by some other portion of the act and only to the extent to which such power has been conferred.

Now there are only two provisions of the act by which the provincial legislature are authorised to raise a revenue by taxation. They are contained in sub-section 2, and sub-section 9, of section 92, and they are in these terms : Sub-section 2—"*Direct taxation within the province, in order* " *to the raising of a revenue for provincial purposes.*"

Sub-section 9.—*Shop, saloon, tavern, auctioneer and other* " *licenses in order to the raising of a revenue for provincial,* " *local or municipal purposes.*"

These two sub-sections are mere exceptions to the exclusive power of taxation conferred in the Dominion Parliament by section 91, sub-section 3, and must be read in connection with this last sub-section, as if it was in the following terms, viz :

" It shall be lawful for the Queen, by and with the ad-
" vice and consent of the Senate and House of Commons,
" to make laws for the peace, order and good government
" of Canada, in relation to all matters not coming within

" the classes of subject by this Act assigned exclusively " to the legislatures of the Provinces ; and for greater " certainty, but not so as to restrict the generality of the " foregoing terms of this section, it is hereby declared " that (notwithstanding anything in this act) the exclusive " legislative authority of the Parliament of Canada " extends."

3o. " To the raising of money by any mode or system " of taxation, with the exception that each Provincial " Legislature may exclusively make laws, in relation to " Direct Taxation within the Province, in order to the " raising of a revenue for provincial purposes, and in " relation to shop, saloon, tavern, auctioneer and other " licences, in order to the raising of a revenue for provin- " cial, local or municipal purposes."

There is no authority here conferred on the Provincial Legislatures to raise a revenue by indirect taxation, nor by customs or excise duties, except in so far as shop, saloon, tavern, auctioneer and other licenses, may be considered as excise duties, all others being excluded by the exclusive power of taxation conferred to the Dominion Parliament by sub-section 3, of section 91, and by sections 102, 121, 122, 123, 124 and 126 already mentioned.

This is made very clear by the resolutions which were submitted to the Legislature of the Province of Canada, as the basis of the Confederation Act. Resolution 29. (Debates on Confederation, p. 3), proposed that: *The General Parliament shall have power to make laws for the peace, welfare*, &c., and especially laws respecting :

3o *The imposition or regulation of duties of Customs or Imports and Exports, except on exports of timber, etc. from New Brunswick and of coal and other minerals from Nova Scotia.*

4o *The imposition and regulation of Excise Duties.*

5o *The raising of money by all or any other modes or system of taxation.*

In the Confederation Act, the articles 3 and 4 of the 29th resolution were dropped, except as to export duties on lumber in New Brunswick, and on coal in Nova Scotia, which were provided for in another form by sections 109 and 124 of the Act, and article 5 which became subsection 3, of the 91st section, was modified by striking out the words "*All or any other modes or systems of taxa-* "*tion,*" and substituting therefore the words "*by any* "*mode or system of taxation,*" so as to include the duties of custom and of excise, mentioned in the third and fourth articles; and to avoid doubts as to the respective powers of the Dominion Parliament, and of the Provincial Legislatures, the word "*exclusively*" was added in the first part of section 91, so as to give to the Dominion Parliament the exclusive power to legislate on customs and excise duties as well as on the other subjects mentioned in this section. Then the other sections already cited, namely 102 and 126, specially provided that the local governments shall have no other sources of revenue, except those expressly reserved and those which they are authorised to raise, in accordance with the special powers conferred upon them by the act; so that apart, from the exclusive authority given to the Dominion Parliament to raise a revenue by all modes of taxation, we have the repeated declarations contained in sections 102 and 126, that the provinces shall have no right to impose any duties or taxes, except under the special powers given to them by the Act.

I find no difficulty in reconciling the exclusive power given to the Dominion, with the exclusive power attributed to the Provincial Legislatures as regards taxation. The Dominion Parliament has the exclusive power to raise a revenue by all modes of taxation for Dominion purposes, and the Provincial Legislatures have exclusive authority to raise a revenue by direct taxation for provincial purposes. That is the Dominion alone, to the exclusion of the Provincial Legislatures, is autorized to raise a

revenue for Dominion or general purposes, and the Provincial Legislatures to the exclusion of the Dominion Parliament are authorised to raise a revenue by their direct taxation for their respective province; in other words the Dominion Parliament cannot interfere with the taxation for provincial purposes, nor the local Legislatures with the taxation for Dominion purposes.

It has been contented that as by sub-section 16 of sect. 92, the local legislatures were authorised to legislate on all matters of a purely local or private nature in the province, they were therefore authorized to raise a revenue for provincial purposes by all modes of taxation, including direct and indirect, as well as by customs and excise duties. The answer to this contention is obvious. One of the most elementary rules of interpretation of statute is that general provisions in an act of parliament does not control nor affect the special enactments which it contains, and therefore the general authority conferred by sub-section 16, as to matters of a purely local or private nature in the province can only apply to such other matters as are not specially provided for by the act, and as the subject of provincial taxation is specially provided for by sub-sect. 2 & 9 of section 92, sub-section 16 does not apply to the subject of taxation. (Dwarris p. 765.)

If sub-section 16, was not limited by the preceeding sub-sections 2 et 9, these sub-sections would have been quite unnecessay, since sub-sect. 16, by the generality of its terms, would have covered all subjects over which the provincial legislatures could have exercised their legislative authority.

The historical evidence derived from the discussions whicn took place in the parliament of Canada on the confederation resolutions show that it was never intended that the local legislatures should have the unlimited power to impose all kinds of taxes.

Sir Alexander Galt, then Finance Minister, in explaining the financial aspect of the proposed confederation

said! (Parliamentary Debates on Confederation, p. 58.)
" If nevertheless the local revenues become inadequate,
" it will be necessary for the local government to have
" recourse to *direct taxation*, and I do not hesitate to say
" that one of the wisest provisions in the proposed cons-
" titution, and that which affords the surest guarantee
" that the people will take a healthy interest in their
" own affairs and see that no extravagance is committed
" by those placed in power over them, is to be found in
" the fact that those who are called upon to administer
" public affairs will feel, when they resort to direct taxa-
" tion, that a solemn responsibility rests upon them, and
" that, that responsibility will be exacted by the people
" in the most peremptory manner. If the men in power
" find that they are required, by means of *direct taxation*,
" to procure the funds necessary to administer the local
" affairs for which abondant provision is made in the
" scheme, they will pause before they enter upon any
" career of extravagance. Indeed, I do not hesitate to
" say, that if the public men of those provinces were suf-
" ficiently educated to understand they own interests, in
" the true light of the principles of political economy, it
" would be found better now to substitute *direct taxation*
" for some of the indirect modes by which taxation has
" been imposed upon the industry of the people. I do
" not, however, believe that at this moment it is possible,
" nor do I think the people of this country would support
" any government in adopting this measure, unless it
" were foreed upon them by the pressure of an overwhelm-
" ing necessity."

And further, (p. 69,) Mr. Galt added:

" In transferring to the general government all the
" large sources of revenue, and in placing in their hands,
" with a single exception, that of *direct taxation*, all the
" means whereby the industry of the people may be
" made to contribute to the wants of the state etc.

The tax Mr. Galt was speaking of and which he thought *could only be forced on the people by the pressure of an overwhelming necessity*, was neither a custom, nor an excise duty, both of which the people of Canada had long been accustomed to pay, but the direct tax which is assessed by the tax gatherer going to every house and exacting either a capitation tax, or a proportion of each inhabitant's income or property to replenish the provincial treasury. These were the only direct taxes known in the provinces in some of which they were raised for municipal and partially for school purposes.

When Mr. Galt gave this solemn warning to the public men who would be charged under Confederation with the management of the provincial affairs, and spoke of this dreaded direct tax,he did not contemplate, that to convert it in the most popular tax ever imposed, it would only be necessary to the provincial legislatures to pass an act, with the title " *An act to raise a revenue for provincial purposes* " *by means of a direct tax within the Province*," and to exact that every British, foreign or domestic Insurance Corporation, every Bank, every loan company, every Navigation and Telegraph company,whether incorporated in Canada or elsewhere, whether their stock was held in the province or not, but doing business in the province, should pay a tax calculated not on the amount of business done in the province, but on the paid up capital or stock of each company, so as to indirectly collect the greater portion of this tax through the English, the American and other capitalists investing their money in any of the commercial entreprises mentionned in the act.

As however the legislatures of the Provinces cannot extend their power of taxation by declaring that a tax is a direct tax, if it is not so under the British North America Act, we have to examine the question raised in the present cases, irrespective of the description or name given by the 45th Vict., ch. 22, to the tax imposed by its provisions.

It is not contended that the present tax was imposed under the authority of sub-section nine, for it is not a tax raised by means of licenses, and it is evident that the legislature intended to *impose certain direct taxes,* since it has used those very words in the title of the act, yet it is necessary to ascertain what is the character of the duties which the provinces were authorised to raise by means of the licenses mentioned in sub-section nine, in order to collect the meaning which the legislature of the late Province of Canada and the Imperial Parliament have attached to the words " direct taxation " as used in the resolutions passed by that legislature and in the British North America Act.

It seems evident that neither the Legislature of Canada, nor the Imperial Parliament did consider that the revenues to be raised by these licenses were " direct taxes " otherwise sub-section nine would have had no meaning, since " direct taxation " was already provided for by sub-section 2.

Now, let us see, how these license duties and other similar duties were considered in England before and at the time the British North America Act was passed. As far back as 1803, the Imperial Parliament passed an Act (43, Georges III, chap. 69) to repeal duties of *excise* and to impose others to replace them. The first item of the new duties mentioned in schedule A, under the title " *Duties of excise* " is a duty of six pence on sales by auction of certain property to the amount of twenty shillings, and the second item is of another duty of ten pence on similar sales of other classes of property. Then the same schedule headed duties of excise contain a description of persons who are obliged to take licenses in order to exercise certain trades or business and among them are found, besides those for manufacturing or selling beer, ale, or spirits of any kind, *every person exercising the trade* or business of *auctioneer*, every person trading or vending or selling *coffee, tea, cocoanut,* every person trading in vending

or selling *gold or silver plate*, every dealer or seller of *tabacco* or *snuff* are bound to take a license, for which they have to pay a license for, varying in amount according to the kind or amount of business done.

The necessities of state during the great continental wars of the first quarter of the present century required constant changes in those licenses and duties, and there are several statutes in which they are described as excise licenses and excise duties.

In course of time new taxes were imposed, and, among others, a tax on Railway Companies which is charged on the number of passengers carried. No license is required in this case. This tax is however placed in the list of excise duties.

In 1864, three years before the passing of the British North America Act, the Imperial Parliament passed the 27th and 28th Vict., ch. 56, by which it is enacted that from and after the first day of July 1864, the duties now payable by law upon or in respect of the licenses to be taken out in the kingdom " by persons carrying on the " trades and business hereinafter mentioned as de- " scribed and defined by statutes relating to such licenses " and trades or business respectively that is to say :

" Appraisers, pawnbrokers, dealers in gold and silver plate,owners,proprietors, makers and compounders of and persons uttering, vending or exposing for sale any medicines, liable to a stamp duty, hawkers and pedlars, house agents, sellers of playing cards not being makers thereof, shall, respectively, be denominated and deemed to be duties of excise and the said licenses respectively shall be."

Again, if we look at the returns made to Parliament of the different sources of revenue for the fiscal year ended on the 31st of March 1866, the year before the Act of Confederation was passed, we find the last mentioned duties classed among the duties collected from excise, as also the Railway tax, the stage carriage tax, licenses and duties on retailers of spirits, on tea and coffee dealers, on

auctioneers and on many other classes of persons carrying particular trades or business.

It may be true, as observed by Stephen, *loc. cit.* that some of these imposts are not properly in the nature of excise duties,if these words are used in the limited sense of duties on consumption,but it is not the technical classification which political economists might make of these different imposts, we have to ascertain, it is the legal meaning which the Imperal Parliament has attached to the duties which the Provincial Legislatures are authorised to impose by means of shop, tavern, auctioneer and other licenses mentioned in sub-sec. 9, and this we find clearly indicated in the several statutes which have been passed since the beginning of the present century to regulate excise duties, and the public documents submitted to and sanctioned by the Imperial Parliament. If these license duties in their origine where not strictly excise duties, in the technical sense of those words, they are so intimately connected with them as accessories to the raising of excise duties, that they have long since been considered as part and portion of them; and if, as Merlin tells us, the *droits d'enregistrement* in France are generally considered as indirect tax, although they are not properly so, there is far greater reason in construing an Imperial statute to consider as excise duties what the Imperial Parliament has repeatedly declared to be so.

The licenses mentioned in sub-sect. 9, of the B. N. A. Act, are the same as some of those mentioned in the statutes and returns we have just referred to; and in the absence of any expressions to distinguish them from the same imposts levied in England, we must hold that they are of the same character, and that by enacting the 9th sub-sect., of sect. 92, Parliament clearly indicated their intention of authorising the Provincial Legislatures to impose, by means of licenses, imposts which were different from and not included in the authority given by sub-section 2, to raise a revenue by direct taxation.

The next inquiry is as to whether the present taxes are of the same nature as those mentioned in sub-section 9.

It seems to be indefferent how a business tax is levied in England. It is sometimes by a license fee, as in the case of shop and tavern keepers, hawkers and pedlars, &c.; sometimes partly by a license fee and partly by a percentage on the business as in the case of auctioneers; in the case of Railways, no licenses are issued and the tax is on the number of passengers carried, that is on the gross business of the companies, or it is on the number of miles run, irrespective of the business done, as in the case of stage, carriages, and sometimes on the kind of carriage, the number of seats they have, or the number of horses attached, that is on the capacity to do business, irrespective of its amount, and yet the nature of the tax is not changed by these differences, and in all these cases, the impost is considered as an excise duty. Cooley on Taxation, p.p. 20, 21, says :—

TAXES ON EMPLOYMENTS.

" A tax on the privilege of carrying on a business or " employment will commonly be imposed in the form of " an *excise tax* on the license to pursue the employment; " and this may be a specific sum or a sum whose amount " is regulated by the business done, or income, or profits " earned. Sometimes small license fees are required, " mainly for the purpose of regulation, but in other " cases substantial taxes are demanded because, the per- " sons upon whom they are laid would otherwise escape " taxation in the main, if not entirely. Instances of haw- " kers, pedlars, auctioneers, &c., will readily occur to the " mind. The form of a license, though not necessary, is " a convenient form such a tax to assume, because it then " become a condition to entering the business or employ- " ment and is collected without difficulty. ***But it is*** " *equally competent to impose and collect the tax by usual methods.*"

Mr. Justice Manning in, the case of Childers vs. People, (11 Michigan, p.p. 43, 49,) says : " Taxes upon business " are usually collected in the form of license fees ; and " this may possibly have led to the idea which seems to " prevail in some quarters that a tax implies a licence. " But there is no necessary connection between them. " A business may be licensed and yet not taxed, or it may " be taxed and yet not licensed."

This shows that the character of a tax is not altered by the fact that it is collected by means of a license fee or without license.

In the present instance, the tax imposed was mentioned as a license or license tax in the bill when first introduced into the legislature. During the progress of the measure the title of the bill was changed into that of an act to impose certain DIRECT TAXES on certain commercial corporations. It cannot be reasonably contended that the nature of the tax was hereby altered. The name alone was changed but not the substance.

It is also evident that there can be no difference whether the tax is imposed on individuals, companies or corporations. We have just seen that in England an excise duty was imposed on Railway corporations, as well as on the owners of stage carriages and hackney coaches.

In the United States, where the States Legislasures are endowed with general powers to legislate on all subjects, not specially delegated to Congress, representing the Federal legislative authority,and where the several States are authorised to raise a revenue by means of *excise duties*, the question as to the nature of a tax on the business carried on by corporations has repeatedly been adjudieated upon and its proper classification determined.

In the case of the Attorney General vs. the Bay State Mining Co. (99 Mass. 148) it was held that the right to exercise a corporate franchise within the State of Massachusett was the proper subject of an *excise tax* which the State had the right to impose. The same thing was

decided in the case of Oliver vs. The London Fire Insurance Co., 100 Mass., 538.

In the case of the *Commonwealth versus the Hamilton Manufacturing* Co, 12 Allen 298, Bigelow C. J. said: " It is too " clear to admit discussion that according to recent adju- " dications of this Court, the assessment who is the sub- " ject of controversy in these actions must be supported, " if sustained at all, as the exercise by the legislature of " the authority conferred by that clause of the constitu- " tion, Part. 2, Ch. 1, § 1, Art. 4. Which gives the power " of imposing duties *and excises* upon any commodity " within the commonwealth, in other words, it cannot " be held valid unless it can be construed to be in the " nature *of an excise tax on the franchise of the corpora- " tions designated in the statute*..... and at p. 304 the " learned judge adds: " These illustrations serve to show " that an assessment based on the market value of the " shares of a corporation, of the aggregate of said shares " or capital stock cannot be properly a tax on the pro- " perty of the corporation."

And again at p. 307. " To our minds, it is a sufficient " and decisive answer to that argument, that, according " to the views we have already expressed the assess- " ment, in question, is an *excise duty on the franchise of ' the corporation* on which it is imposed, and was inten- " ded by the legislature to have that operation and effect " only, and not in any proper sense, a tax on corporate " property." See also Portland Black *vs.* Apthorp, 12, Mass. 252.

These decisions differ from those rendered by the United States Supreme Court on the interpretation to be given to the words " *direct taxes* " used in the Contitution of the United States, in as much as the Court had to consider how far direct taxation was limited by the necessity of apportionment, according to census or population, while in the other cases the naked question was whether a tax on business or on what is described as a tax on the

franchise, when applied to a corporation, was an *excise tax* or not. The affirmative decisions on this point are directly applicable to the present cases, and they show conclusively that, in the United States, as well as in England, a tax on business or employement is considered as an *excise tax.* The effect of a tax on the manufacturer, as in the case of the Williams Manufacturing Co., or on the carrier as in the case of the Lumber Export Company, is just the same as if the tax was imposed on the goods manufacted in the one case or conveyed in the other; in both cases the result is to raise the price of the commodity and to cause the tax to be paid by the consumer, or to reduce the profits of the producer in which case he has to pay the whole or a portion of the duty.

That excise taxes are not direct taxes does not, it seems, admit of controversy, at least at the present time, whatever may have been the discussions on the subject at an early date of their imposition, it is admitted by every writer on political economy whether English, French,or American. And this has not been questioned either at the bar, or by any of the Judges who have decided the present cases.

If there could be a doubt as to whether the tax imposed by the Quebec Legislature is an indirect tax, there can be none that according to Imperial Legislation and American jurisprudence (their seem to be no occasion where such a question can arise in the courts in England), this is an *excise tax;* and the Provincial Legislatures have no more authority to impose an excise tax, than an indirect tax.

If we now turn to the decisions rendered on the taxing powers conferred by the British North America Act, we find that in Severn and the Queen (2, Supreme Court Reports, p. 79) all the judges admitted that a license fee of $50 impose upon a brewer was an *indirect tax.* At p. 94, Richards, C. J., qualified it as an *excise tax*, when he said: "It is not doubted that the Dominion Legislature had the right to lay on this excise tax and to grant this license."

In the case of the Attorney General *vs.* The Queen Insurance Co., appeal Cases, their Lordships of the Privy Council held that the tax was not a direct tax and therefore *ultra vires.*

I understand that the same conclusion has been arrived at by their Lordships in the case of the Attorney General *vs.* Reed, with reference to the tax recently imposed upon legal proceedings, although I have not yet seen the written judgment in that case.

It was held in those three cases that the Provincial Legislatures had no authority to impose indirect taxes, unless they came within the scope of sub-section 9 of section 92, and that the taxes imposed were not direct taxes.

It will be said that in the case of *Black* vs. *Dow* the Privy Council stated that there might be other taxes imposed under sub-section 16, besides those mentioned in sub-sections 2 and 9, but this was entirely outside of the case since their Lordships were of opinion that the tax was direct tax and did not indicate what other taxes could be imposed under section 16, and therefore it cannot be said to what they alluded by the observation they made I am however free to admit that there may possibly be some taxes which might be imposed for local purposes under sub-sect. 16.

When we consider that every provision of the British North America Act shows that the object of the promoters of the measure was to place each province in a state of perfect independance as regards each other, to establish the utmost freedom of intercourse and commercial relations between them, to exclude from the legislative authority of the provinces all regulations as to trade and commerce, customs and excise, navigation and shipping, banks, bankruptcy and insolvency, in fact every subject which might give occasion to an interference by one province directly or indirectly with another, would affect the interests of the other provinces ; it is impossible to sup-

pose that it was intended to allow the several provinces to raise their revenue by taxes calculated to reach the inhabitants of the other provinces, their monetary institutions, their telegraphs and insurrnce companies and the natural or industrial products of each by duties imposed, not on the products themselves (this is expressly forbidden by the B. N. Act.) upon every Railway Company, every Steamship or other Navigation Company, whose ships should be employed to move such products from one province to another or to a foreign market. Such a pretention is inconsistent with the whole object and intent of the act, as disclosed by almost every disposition which it contains, and affords a strong argument against the validity of the present tax.

The words " *Direct taxation within the Province* seem to imply that the taxes to be imposed must be raised from persons residing or property situated within the Province by which they are imposed and not elsewhere. This is a characteristic feature of direct taxation, that it is only raised from persons residing in the territory where there are imposed, or on property therein situated. I do not mention this as decisive but as an indication of what was meant by " direct taxation " in the British North America Act.

To pretend that the present tax is a direct tax would be to hold that it is a personal or capitation tax. A capitation tax as its name indicates is a general tax imposed on each head of the community. I do not know how this could apply to a corporation, and more particularly when it is imposed on the capital of such corporations and on the several offices which they have. The effect of which would be that several capitation taxes might be imposed on the same corporation. As is the case with the Merchants Bank from which five or six taxes are claimed by reason of the several offices it has in the province.

Whether this tax is considered from the evident intention of the framers of the B. N. A. Act, as disclosed by its

enactments or from the various dispositions contained in others acts of the Imperial Parliament as regards similar taxes raised in England, or again from the light to be derived from the decisions of the Supreme Court and of the Privy Council, or from those of the United States and the general tenor of the definitions given by political economists, on the subject of direct and indirect taxation, I cannot arrive at any other conclusion but that the present taxes must be held to be *excise* and *indirect taxes* which the Provincial Legislatures have no right to impose.

I would confirm the judgments in the five Bank cases, and reverse the judgments in the other four cases. I am however in the minority, and the judgment in the Bank cases will be reversed and the others confirmed.

OPINION OF MR. JUSTICE RAMSAY.

RAMSAY, J.—One of the learned counsel who addressed the court said that instead of getting clearer, the dividing line between federal and local powers was getting more obscure. Unfortunately this pessimist view of the matter is not altogether unreal. Opinions are very divergent,and many of those who are qualified to speak and who, moreover, are entitled to speak with authority on the subject, seem to disagree irreconcilably on questions of the utmost importance. This is not altogether satisfactory, it must be confessed, but it is our duty not to be discouraged but to strive manfully to find out the solution of all these difficulties. Some solution there must be, and it will be discovered by those alone who seek for truth and not for triumph; and, above all, by those who are not seeking to further some cherished political dream or selfish project. In deprecating certain kinds of discussion, it does not follow one dreads strife, or is alone content to see a cautious reserve of a lethargic indifference. On the contrary, it is salutary that every possible position should be debated with the utmost zeal and with the keenest logic.

What is to be deplored is the waste of time and efforts, and sometimes talents, which could be turned to better account, in sustaining impossible themes or in circulating irritating quibbles. If confederation is to be a success we must interpret the constitution with the utmost loyalty. In great measure the responsibility of this task devolves upon the courts. At all events, there the questions in their most abstract form present themselves, and therefore it is that every judicial utterrance on this subject should be given forth under the sanction of the gravest responsibility. We are dealing, not with a trifling statute passed to regulate some paltry concern, but with the constitution of, perhaps, a great nation. Speaking with the fullest consciousness of this responsibility, I do not hesitate to say that to pretend that the acts of 1774 and 1791 have any direct bearing on the interpretation to be given to the B. N. A. act appears to me to be neither loyal nor honest. Again, to magnify the powers of the federal parliament, by a forced interpretation of the constitutional act, so as to absorb almost all the local powers, is disloyal and dishonest. Being of this mind I adopt unreservedly the doctrine put forth by those opposed to the tax complained of, when they say that the powers of the provinces are all to be found consigned in the constitutional act and its amendments, and by purity of reasoning it must be admitted that the federal powers are derived from the same source. We may say of Canada, as C. J. Marshall said of the United States, and with greater emphasis: "This government is acknowledged by all to be one of enumerated powers." McCulloch *vs.* State of Maryland, 4 Wheaton, 405. Hence we have the doctrine every where proclaimed that the local legislatures are as omnipotent within the sphere of their powers as the Dominion parliament is within its jurisdiction. It would be difficult to arrive at any other conclusion, for when the Queen, Lords and Commons give a power it cannot be questioned by any other authority. The extent of the grant may

alone be questioned. Lest it be though that I unwittingly neglect advice proferred by high authority, I shall at once refer to a *dictum* of the Privy Council which now especially demands our attention, and which, it appears to me, may be easily misunderstood. In the case of the Queen Insurance Co. and Parsons, their lordships said, referring to the difficulty of arriving at the proper interpretation of the language of sects. 91 and 92, " In performing this difficult duty it will be a wise course for those on whom it is thrown to decide each case as best they can, without entering more largely upon an interpretation of the statute than is necessary for the decision of the particular question in hand." If this rule were adopted literally it would be the enthronement of empiricism. But it is to be observed that their lordships only give this caution when dealing with the dangers of the double enumeration of sections 91 and 92, and the evident misuse of the word *exclusively* in each section. The warning was against making precedents before experience had given a guide as to the working of the new constitution. So considered I recognize the wisdom of the caution, and I invoke it as an admission of great authority, that the work of conciliation must go on till all the possible cases have been disposed of. The special application of this admission will appear more clearly later on.

From another quarter we have recently received an intimation as to our duty, which also demands our notice and requires qualification. The learned chief justice of the Supreme Court is reported to have said that all the courts in Canada were *bound* by the decisions of the Supreme Court. In this saying there is just that grain of truth which is dangerous. It is a rhetorical rather than a legal way of putting the matter. "*Ajunt rhetores, judicatum esse partem juris.*" There is no such institution of the law as that laid down. The decision binds in the particular case ; it is only a rule of authority in other cases. Now the basis of authority is reason, and, therefore, that

only which is reasonable is authoritative. It is doubtless very inconvenient that jurisprudence should be uncertain, but it would be still more inconvenient if courts, out of an obsequious deference, adopted as law that which clearly is not law. In practice we follow a middle course, which, while it tends to avoid the perpetuation of error, to some extent renders the administration of justice certain. Volumes of over-ruled cases and the *dicta* of very distinguished judges and jurists attest the correctness of this remark. In Hogan and al. and Bernier (21 I. 101) a very able judge, now no more, refering to the case of Dorion and Hyde, said : "Je ne me crois pas lié par ce précédent, et je regretterais de donner mon concours à l'établissement d'une jurisprudence que je crois erronée." The precedent which Mr. Justice Dorion deemed himself justified in rejecting as authoritative was a judgment of the Court of Appeals confirming a judgment of his own court in review. To this I shall only add what Hale says on the point : " It is true the decisions of courts of justice, though by virtue of the laws of this realm they do bind, as a law between the parties thereto, as to the particular case in question, till reversed by error or attaint, yet they do not make a law, properly so called, for that only the king and parliament can do ; yet they have a great weight and authority in expounding, declaring and publishing what the law of this kingdom is, especially when such decisions hold a consonancy and congruity with resolutions and decisions of former times." Hist. of Common Law, chap. 4, vol. 2, p. 142. I allude to this specially as the authority of precedents has been particularly insisted on in these arguments, and it seems to me well to observe that two things are to be examined when considering a precedent : 1. Whether it is precisely in point. 2. Whether it will stand the test of reason. And in deciding as to this, last, whether it has been assented to at all times. The case of Angers and The Queen Ins. Co. has been relied upon as conclusive authority against the validity of the present tax. To me

it appears to decide absolutely nothing that has to be decided in this case. Firstly, then let us examine what was submitted to the Privy Council, and what was decided there. When the case came before us, only two propositions were submitted (1) whether the tax was a direct tax, and consequently under par. 2 of sect. 92 ; (2) whether it was, as it was called, a license, under par. 9. Here it was held, unanimously, that the particular impost, then in question, was not direct taxation, and that it was not a license within the terms of par. 9. This decision was confirmed by the Privy Council. Had this been all the scope given to the case, the decision might not have done much mischief, but unfortunately one of the learned judges in this Court, in delivering his opinion entered upon a discussion of questions of political economy, purporting to be supported by quotations, which was evidently intended to lay down a general and authoritative distinction between direct and indirect taxation in all cases. It is an ungracious task to criticize a work which had necessitated considerable diligence on the part of its author; but it has obtained some recognition, and to my mind it seems so fallacious that I deem it my duty to combat its method and its conclusions at the first opportunity. I may add to this that the speculations on the subject of political economy, which it is sought to incorporate into the law as recognized truths, are peculiarly liable to misconception. Archbishop Whately, in its lectures on political economy, recommends the student to consider " a clear definition of technical terms, and careful adherence to the sense defined as the first—the most important—and the most difficult point in the science of political economy," Lect. ix. Disregarding all such caution it was unhesitatingly asserted that all the authors were agreed, French, English and American, legal and lay, on the line of demarcation, between direct and indirect taxation. Strictly speaking, with the writings of political economists we have nothing to do. If a technical meaning is to be given to a word

or words in a statute, that meaning must be proved by testimony and not by books, like every other fact. We do not even accept foreign law, of which the course of our studies might enable us to know something, on the authority of books ; how then, could we be expected to guard ourselves from error if attempted to deal with the technicalities of particular sciences, of which we are presumed to be perfectly ignorant, on scraps culled from the works of speculative writers ? I do not feel myself obliged to show that the scientific writings submitted to us do not sustain conclusively the theories they were brought forward to support, and the course followed in the case of Angers vs. The Queen Ins. Co. illustrates so perfectly the evil of neglecting the ordinary rule I invoke, that I shall not hesitate, once for all, (to protest against an evil practice not to create a precedent), to point out the errors to which it has given rise. It was evidently expected that we should understand that the division between direct and indirect taxes was this, that a direct tax was one which the person who paid it was not to get out of another ; while an indirect tax was one for the payment of which he expected to be recouped. That this was the lesson supposed to be taught, and on which all the economists were said to be agreed, is beyond question, for it was repeated several times at the argument of the cases now before us. In one place, Mill says something like this. I quote from the passage of which Mr. Justice Taschereau relied to show that he agreed with everybody and everybody with him : " A direct tax is one which is demanded from the very person who it is *intended* or *desired* should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another, such as the excise or the customs," etc. But this brilliant writer carries his doctrine out, for he adds : " Most taxes on expenditure are indirect, but some are direct, being imposed, not on the producer or seller of an

article, but immediately on the consumer." Now how does this test correspond with what Adam Smith says : " A direct tax operates and takes effect independently of consumption or expenditure, while indirect taxes affect expenses or consumption, and the revenue arising from them is dependent thereon." These systems, then, are totally different, and, I take it, neither indicates the meaning of parliament in enacting par. 2, sec. 91 B. N. A. Act. Again, many of the economists, and Mill amongst them, classify taxes into direct and indirect. However, in Hylton vs. the United States, Chase, J., said : " I believe some taxes may be both direct and indirect at the same time." Mill also says, "The financial systems of most countries comprise a variety of miscellaneous imposts *not directly included in either class*," i.e., of direct or indirect taxes : Pr. of Pol. E., chap. v., p. 1. The legal definition in France of *contributions directes et indirectes* do not cover the whole ground of taxation. See what Merlin says as to the *droits d'enregistrement.* He shows they are not indirect according to their system. Turning to the French system no similarity can be expected betwen the French and English writers, for the former write under laws which leave little room for doubt as to what is a direct tax in France, and what an indirect tax. In one of the scraps quoted from Say, he tells us this ; and a note on the next page to that quoted by Mr. Justice Taschereau is specially inserted to prevent the cursory reader making the mistake into which the Privy Council all but irretrievably fell. Merlin and Favard de Langlade are perfectly clear on the point. In fact it is difficult to understand how any one could have copied extracts from these precise writers without seeing that they were exposing a definite, and to some degree, an arbitrary rule, and not playing with theories. In England there are no legal writers on the subject, for there is no legal distinction between the two imposts, and the economists use the terms direct and indirect rather to describe the incidence

of the impost, which is often influenced by circumstances over which the legislature has no control, and which it does not even contemplate, than to define terms or to make an abstract classification. Mr. Dudley Baxter, in his book "The Taxation of the United Kingdom," admits this p. 20. "One of the oldest and most simple definitions divides all taxes into the two heads of direct and indirect taxation; direct taxes being those which are paid by the person himself, who is meant to be the real contributory, such as assessed taxes, and indirect being those which are paid by an intermediary, who reimburses himself from the real contributor, such as the customs and excise duties. But this definition cannot furnish us with a trustworthy classification, since it is founded upon an accident in the manner of payment and not upon the nature of the taxes themselves. The income and property tax, for instance, is direct taxation when paid by the owner himself, and indirect when paid by the tenant or mortgagor." The Taxation of the Kingdom. R. Dudley Baxter, page 20. It is otherwise in the United States and France, and also here. By the constitution of the United States a direct tax is imposed differently from an indirect one. Art. 1, sec. 9, par. 4. Hence the courts have been called upon to designate the classes in order to decide whether the impost is legal or not. In France the question comes before the courts in diametrically the reverse way, for there a tax becomes direct or indirect, not by any quality in the nature of the tax, but by the mode of its imposition. In France it is not a question of expenditure or recoupment, but whether the tax is on the person or on a product. Thus the taxes on industries (patentes) are all direct, while the tax on theatre tickets is indirect, (His Honor read from Say, and quoted Merlin, et Favard de Langlade.) The similarity of the systems and the unanimity of writers on the subject, generally speaking, is the wildest delusion, it appears to me; but there is one point common to the legal systems existing in France and

in the United States, not unimportant to us, which, curious to say, has escaped the notice of our economist jurists. The common principle to which I refer is this, that the division between direct and indirect taxation is necessarily arbitrary. In France it is formally, and in the United States practically so. In the case of Hylton and the United States, Hamilton attempted to lay down a scientific basis for the distinction, but Chase, J., was not misled either by the eloquence or the ingenuity of that distinguished advocate, and he expressed the opinion that, within the meaning of the constitution, a direct tax was on the person and on land, and perhaps, on revenue. This has since been confirmed in Stringer vs. U. S., 102, U. S. reports. Now with us there is no doubt that a tax on revenue is of the same nature as a tax on land, and consequently if the one is direct taxation so is the other. At the argument a strange proposition was advanced, namely, that a poll tax was not a direct tax unless it was general. It is Mill who says that if a tax is not general it may be avoided, and therefore it is not direct taxation. His reasoning is, that if you tax carpenters and not masons the carpenters may all become masons. We need not enquire, fortunately for us, how this accords with the consumer argument already mentioned, but what he says only illustrates more fully what I have adverted to already, that the English economists are not dealing with a term but are speculating on results which the terms direct and indirect do not express adequately; and that if we were to be guided by what they say, there would be no means of arriving at a conclusion as to what constitutes direct taxation, and we should, therefore, be obliged to say that there was no such thing. By a similar process of reasoning, we could more easily arrive at the conclusion that there was no such a thing as indirect taxation, and by a little developpement of this plastic logic we might perhaps arrive at the happy delusion that we are not taxed at all. In order that it may not be sup-

posed that I have given an unfair idea to what Mill says, I will read what he says at page 497. (Read Mill, p. 497). It is only too clear that there is no scientific distinction between direct and indirect taxation, and that, therefore, if we might properly consult scientific books for the value of technical terms, we should lose our time in searching the works of the political economists to find out a meaning for "direct taxation." But without their aid we must define it, as it has become a law term with us. I am not aware that there is any reason for me to modify what I said in Angers and the Queen's Insurance Company with regard to this matter, for although the late Master of the Rolls, in giving the judgment of the Privy Council, seemed to be influenced to some extent by the apparent unanimity of the writers, he very guardedly decided that "*such* a stamp imposed by the legislature is not direct taxation." I have no difficulty in conforming myself to this *dictum*. With regard to the other question decided in that case, namely, whether license or not, it does not arise in this case. We therefore come to the first point we have to deside, whether the tax now in question is within the ruling of the case of Angers and the Queen's Insurance Company or not, and if not, whether it is direct taxation within the meaning of the B. N. A. Act? On the first part of this question there is hardly room for a difference of opinion. In the former case the tax was levied on any one who might insure. The present tax is on every Canadian Bank, &c., doing business in the Province of Quebec, and the measure of the charge is the paid-up capital of the bank. There is also a business tax. At the argument the contention that the tax was not direct seemed ultimately to be confined to the consideration that it was not a tax on property within the province, or on the property of persons residing in the province, or even a tax on property, but that it was a tax on the franchise. I presume that a tax on the franchise means a tax on those privileges which go to make up the corporation,

and consequently it is a tax on the person. If the position be correct that any tax on the person, his property or his revenue is direct taxation, in the meaning of the B. N. A. Act, (and there is no decision contravening it) then a tax on the franchise of a corporation is a direct tax, for a corporation is a person. The law of this province lays down in express terms that "every corporation legally constituted is an artificial or ideal person * * enjoying certain rights and liable to certain obligations (352 C. C.) They are also subject to certain disabilities (364 C. C.) I understand that these articles express correctly the law of England on this subject as well as our law. Smith's mercantile law, chap. 4. There is certainly nothing in our law which could possibly suggest the idea that a corporation might not be made liable to a personal tax, and as I assume the law of England to be the same, I am forced to the conclusion that a tax on the person, or on the franchise of a corporation, is no exception to the general rule of sub-section 2, sect. 92 Of course in the United States a tax on the franchise could not be direct taxation within their constitution; because it could not be adjusted according to the census. And this explains fully the case of the Bank of Commerce vs. New York city; (2 Black 628), and also, I presume, the case mentioned by Hilliard (Law of taxation, ch. 1, par. 36, p. 20,), reported 36 Conn. (512-528), which I have not seen. What I understand to be laid down by these cases is this—A tax on nominal value is not a tax on property, for evidently since the tax is imposed on the nominal value its quality as property is disregarded; it is therefore a tax on the franchise which cannot be adjusted. But, said Mr. Justice Nelson, a tax on the estimated value is a tax upon property, and consequently is direct taxation. As to the tax in question not being a tax on property, the statute (45 Vic., c. 22 Q.) does not impose it as a tax on property, but as a tax on banks, &c., carrying on business in the province. Then by section 3 it regulates how each of these

ideal persons shall be charged. Here it is necessary to distinguish the cases, and first I shall deal with banks They are to pay,not on the nominal value of their capital, but on their paid-up capital. Now, if it be maintained that this tax is not a tax on the person, I do not see how it can be maintained that it is not a tax on property. There is nothing in our constitution which declares anything as to uniformity of taxation, and, therefore, it is no legal objection to a tax that it is not levied upon any general system of valuation. The power to assess being admitted, its measure is a matter of discretion subject to the power of disallowance by the Dominion Government. It is not a legal question.

The next point is that it was not taxation of persons within the jurisdiction of the legislature of Quebec. This difficulty does not appear to me to be formidable. The persons taxed are not the shareholders but the banks or other corporations. The shareholder is never by law confounded with the ideal person, so he can sue the corporation like any other stranger. Smith's Mercantile *loc. cit.* There is nothing in paragraph 2, section 92, to confine the tax to persons domiciled in the province. What the statute says is that the taxation must be within the province, or, in other words, that the provincial government cannot execute its laws beyond its jurisdiction. It scarcely required the words "within the province" to establish this. Hilliard (chap. 1, par. 5, page 5) says: — "The power of taxation * * is necessarily limited to subjects within the jurisdiction of the state. These subjects are persons, property and business." The statute does not propose to tax persons outside the province, but persons carrying on business within it and benefiting by its organization and government. It is an evident error to say that a person is only liable to the laws of his domicile. By his acts he may make himself personally liable to the laws of many countries without ever leaving the place of his birth. I fancy a Frenchman who has never been out of Paris

might become liable to a business tax in Montreal, and I dare say that impost could be collected as any other debt in the French courts. If an individual be thus liable why should a corporation escape a similar liability? The last point is that the property is not within the province. This difficulty is more substantial, and if the tax were not also personal I would be inclined to think it valid as regards banks not having their domicile in Quebec, unless it were known that their stock was there; but as I have already said the tax appears to me to be personal and to be of the most direct kind. As to those having their principal place of business in the Province of Quebec, the question could not arise on any supposition. Again as to the argument that a business tax is not direct I see nothing in that either in principle or in practice. It is notoriously false that a tax on a profession or on a trade or on wages necessarily comes out of the pocket of the employer or the consumer. It stands on the same footing as a tax on profits, and profits are income, and a tax on income is direct taxation. See Say, Cours d'Economie politique, T. 5, p. 420. It will be observed that there are two distinct taxes on the banks, one on the person or on the franchise; the other a purely business tax. The taxes on insurance companies are purely business taxes. Incorporated companies for carrying on some trade, &c., are charged with a personal tax to be increased according to the amount of paid up capital over $250,000 and an additional tax for each place of business. These cover all the descriptions of corporations that have come before this court, and I think all the taxes they complain of are within the category of direct taxation, within the meaning of the B. N. A. Act. I have not referred to the question of excise, although Mr. Justice Taschereau, the ingenious originator of the numerous fallacies, I feel myself called upon to combat, has drawn it into the medley. His error here is very easy of exposition. He has written on a mutilated text, at least as it is given in Cartwright, p. 141. The full text of what

Wharton says is this: "Excise, the name given to the duties or taxes laid on certain articles produced and consumed at home; but exclusive of these, the duties on licenses, auctioneers and post-horses are also placed under the management of the excise, and are consequently included in the excise duties." — Wharton's Law Lexicon vo. Excise. To bring Mr. Justice Taschereau's logic into line we should have to say: Excise duties are direct taxes, certain duties not excise are collected by the exciseman. Therefore they are direct taxes. Really the functions of the guager, as he was irreverently called formerly, owing to the ordinary operations of his calling, have been extended; but that does not alter the nature of direct taxation, nor the meaning of the term in the B. N. A. Act. The act does not use the word "excise," except in a transitory clause, section 102, for certain taxes then imposed, but it is not applied to the general power of taxation. If it had been our business to interpret the word excise, it might perhaps have been a consideration for us whether excise meant all the taxes collected by the exciseman.

There is another view of this case which, it appears to me, merits closer attention than it has received, and that is whether the British North America Act has limited the local powers of taxation to "direct taxation within the province in order to the raising of a revenue for provincial purposes," and to "shops, etc., and other licenses, in order to the raising of a revenue for provincial, local, or municipal purposes," and this to the exclusion of every other form of taxation. This enquiry demands an extended examination of the general scope or scheme of the B. N. A. Act. It has been said the local legislatures are not supreme legislatures. From a purely abstract point of view, no legislature is supreme. In other words, there are limits to jurisdiction, which are not identical with the physical power to execute. Public law is imperfect in this, that it has no constitutional power of execution; nevertheless it expresses a right. When De Hardenberg exclaimed at the

Council of Vienna: *Que fait ici le droit public?*" Talleyrand replied: "*Il fait que vous y êtes.*" Again jurisdiction has moral limits, for it has no authority over conscience. Akin to this limit is the non-ascent of the subject, and so laws become obsolete. It is only, then, relatively, that we can speak of a supreme legislature. Thus restricted, the parliament of the United Kingdoms is supreme as regards all the Queen's dominions. By force of that supremacy it granted the constitution to Canada set forth in the B. N. A. Act, 1867, and by the same power it has amended that act. By the act of 1867 and its amendments, it has divided the powers of legislation between a federal legislature and local legislatures in very different proportions. It is admitted that the local legislatures are as omnipotent within the scope of their legislative powers as the Dominion parliament is within its powers. It does not, however, follow from this that the federal organization has no supremacy over the local. Such a pretension would be utterly untenable, for the federal power alone has the power to nominate one of the branches of the local legislature, it can disallow its acts, it can turn local works into federal works, and it can create new provinces. The true doctrine seems to me to be this, that the federal power is not generally supreme relatively to the local power. Its supremacy consists in its power to influence indirectly the action of the local power, or to paralyze it to some extent, not in the power to destroy it. An indirect attempt to destroy it would therefore be unconstitutional and unlawful. It is likewise generally admitted, as has been already said, that the power of the local legislatures are enumerated in the constitutional acts, and by parity of reasoning it cannot be denied that the powers of Dominion are also to be found there. Giving full effect to this principle, it must not, however, be supposed that it implies that all the powers given by the constitutional acts either to the Dominion parliament or to the local legislatures are specially enumerated. The general power given to

the Queen, senate and house of commons is " to make laws for the peace, order and good government of Canada, in relation to all matters not coming within the classes of subjects by this act assigned exclusively to the legistatures of the provinces." But among the matters coming within the classes of subjects assigned exclusively to the legislatures of the provinces there are general powers of legislation. They make laws as to " all matters of a merely local or private nature in the province." Does this not embrace local taxation for local objects ? And if not, why ? There can be no question, I think, that taxation is a necessary attribute of government. A government that cannot tax would be a nullity, and the fact is that it is a power conferred in some degree or other on the most insignificant municipality in the country. They can impose property and income taxes, insurance taxes of all sorts and a poll tax. The general power to tax to any extent has always been recognized in the United States as an attribute of sovereignty, and I don't think there can be any English authority found to contradict this proposition. " The power of congress to exercise exclusive jurisdiction in all cases whatsoever within the district of Columbia includes the power of taxing it." Loughborough and Blake, 5 Wheaton, 317. " The power of taxing is essential to the very existence of government." 4 Wheaton, 428. " This taxing power is an essential attribute of sovereignty, and can only be abridged by positive legislative enactment, clearly expressed. The power is not affected by a charter which is silent on the subject." Hilliard, Law of taxation, c. 1, par. 85, p. 40. In answer to a question I put at the argument upon this point, Mr. McLaren said that sub-sections 2 and 9 sec. 92, were impliedly a dealing with the whole question of the taxing power, for if the local legislatures had full powers to tax, these two sub-sections would have been unnecessary, and, therefore, the power to tax indirectly is impliedly taken away. This is a very ingenious argument, and the best,

I fancy, which can be put forward, but I don't think it satisfactory. In the first place the rule of interpretation *inclusio unius, exclusio alterius* is one of the feeblest of the rules of interpretion, if it can be called a rule at all. The real rule is thus expressed by Pothier, No. 100 : " Lorsque dans un contrat on a exprimé un cas, pour le doute qu'il aurait pu y avoir si l'engagement qui résulte du contrat s'étendait à ce cas, on n'est pas censé par là avoir voulu restreindre l'étendue que cet engagement a de droit, à tous ceux qui ne sont pas exprimés." It is a rule of the Roman law : " Quæ dubitationis tollendæ causa, contractibus inferuntur, jus commune non lædunt." L. 81, Dig. de rugulis Jur.; L. 56, Mand. I find it equally imperatively expressed in the English law. Coke says : " It is a maxin of the common law that a statute made in the affirmative, without any negative expressed or implied doth not take away the common law." And Lord Hatherley, summing up the opinion of Mr. Justice Blackburn in Ashbury R. Car and Iron Co. vs. Riche, says : " Then he, (Mr. Justice Blackburn) cites from old authorities to show that when once you have given being to such a body as this, you must be taken to have given to it all the consequence of its being called into existence, unless by express negative words, you have restricted the operation of the acts of the body you have so created." L. R. 7, H. L. 685. There are numerous cases supporting this doctrine in different ways. For instance, the distinction has been made between using words that are unnecessary and using words that are unmeaning. The former is readily supposed ; the latter is never presumed. Auchterarder v. Le Kinnoull, 6 C. & F. 686. Words that are, strictly speaking, unnecessary may be used *ex majore cautela.* Duke of Newcastle & Morris, L. R., 14, H. L., 662. Fryer & Morland, L. R., 3 Ch. Div. 685. That is precisely what, I think, was done in this act. The right to tax the person might have been questioned with much greater force than the right to tax indirectly, if nothing

had been said. Besides this, there is a limitation in both sub-sections. Sub-section 2 allows direct taxation in order to the raising of a revenue for provincial purposes, and section 9, authorizing legislation as to certain licenses in order to the raising of a revenue for provincial,local or municipal purposes. In the third place it is, at all events, not an express exclusion of the general power to tax, which seems to be an inherent right of government ; and in the fourth place, sub-section 16 covers any omission of the sort. To this I may add that if the arguments referred to were good in this case, the local legislatures could not legislate as to shops, saloons or taverns at all, except in regard to licenses, in order to raise revenue. This has never been pretended, and Hodge vs. The Queen is an authority to show that such a pretension could not be maintained, for what the legislature of Ontario did was to create license commissioners with power to pass resolutions to close taverns and billiard rooms at certain hours. In Blouin vs. The Corporation of Quebec, Chief Justice Meredith gave a similar decision, as also in the case of Poulin vs. The Corporation of Quebec. The latter case was confirmed on appeal to this court and also to the Supreme Court. But one other argument has been put forward with some plausibility to show that parliament never intended to give the local legislatures the right to tax indirectly. It was said that certain speakers in Canada, who spoke on the resolutions, had expressed the idea that the local governments were to live on direct taxation and on the federal subsidy. It is very true that in France commentators allow themselves great latitude in referring to the history of the code, but the discussions in the council of state and in the tribune were of a very different kind from the discussions of a popular body like the house of assembly ; and I am not aware that any weight is attached in France to the opinions of individual members of the assembly. But nothing is better established in England than this, that the debates in par-

liament are not authority as to the interpretation of statutes. The cases are systematically arranged in Mr. Hardcastle very carefully prepared treatise on the construction and effect of Statutory Law, p. 55. If there be any difference between the French and English law on this point, which I am inclined to doubt, we must, of course, reject the French. In referring to the acts of the legislature we express almost an excessive deference ; but we compensate ourselves for this lip-loyalty to the words of the statute by disregarding totally the sayings of the individual legislator. This necessarily leads us to examine the rules as to the interpretation of statutes, and to a short digression in order that the fundamental principles upon which the right to tax rests, if it exists at all. The difficulty of these rules appears to me to be a good deal overdate. Their simplicity is so great the bookmakers can hardly find materials to make books about them. A statute, according to our ordinary use of the word is an act of the legislature. Its dispositions are either clearly enounced or their terms are ambiguous. In the former case they are to be applied according to their terms, the language being taken to have the meaning popularly attached to it. In delivering the judgment of the Privy Council in McConnel and Murphy, L. R. 5 P. C., p. 218, Sir Montague Smith said: " In mercantile contracts, and indeed in all contracts where the meaning of language is to be determined by the court, the governing principle must be to ascertain the intention of the parties, through the words they have used. This principle is one of universal application." If the terms ambiguous for any cause, whether it be from a vice of construction of a particular section, or from contradiction in the provisions of the statute, or from incompatability with the general meaning of the act, or because literal interpretation would lead to such an absurd conclusion as would frustrate the purposes of the act, then interpretation begins, and it is sought by that to arrive at the true intention of

the legislature. It is not a question of adding to or taking away from the act; but deciding what the act really means. There are a few legislative rules as to the mode of dealing with such difficulties; and also certain rules, derived from experience and reasoning, have been laid down as general guides in such matters; but all these rules leave much to the discretion of the judges, because they are so complex to make their delimitation scarcely more extensive than each particular case. I think, however, it may be said generally speaking, that in the interpretation of a statute *indiciae* similar to those which guide us as to the intention of parties in the absence of express declarations as to their intention, are applicable. Lord Blackburn has explained,with his usual breadth and precision, how the Courts of Law act in construing instruments in writing, and, he adds, "a statute is an instrument in writing." In all cases the object is to see what is the intention expressed by the words used. But, from the imperfection of language, it is impossible to know what that intention is without inquiring further; and seeing what tne circumstances were with reference to which the words were used, and what was the object appearing from those circumstances which the person using them had in view," River Wear *vs.* Adamson, L. R. 2 App., Cas. 763. Another very great authority, M. Justice Hannen, has said: "I am of opinion that an appeal will lie in this case. I think, therefore, that this rule must be made absolute for a mandamus to the justices of Surrey to hear these appeals. I agree with Mr. Thesiger, that an appeal can only be given by the clearly expresed intention of the legislature. This must be ascertained by an examination of the enactment which is the subject of enquiry. It is not necessary that there should be any particular form of words, but it is essential that an intention to give an appeal should clearly appear."

"The authorities that have been cited have not much bearing upon this question, because in all cases the in-

tention of the legislature must depend to a great extent upon the particular object of the statute that has to be construed. I have come to the conclusion that the legislature intended to give an appeal in a case like the present." L. R. Q. B. vol. v., p. 93. The Queen *vs.* Justices of Surrey. Taking these authorities as expressing the general rules for the interpretation of statutes, and which seem to be identical with those which obtain in France. (See H. M. Procureur & Bruneau L. R. 1,P. C. 191), it can scarcely be questioned that the preamble of an act is greatly to be considered in determining the intention of the legislature where there is any doubt as to the meaning of its terms. See also Menoch de Presump, L. vi., Preas 2, Nos. 2, 3, 4, and Comins in his Dig. Vbo. Parliament says:—

"The preamble is a good means for collecting the intent." Now, if we come to the preamble of the B. N. A. Act, 1867, we find the objects of the statute succinctly defined. The fourth paragraph is in these words:— "And whereas on the establishment of the Union by authority of parliament, it is expedient not only that the constitution of the legislative authority in the Dominion be provided for, but also that the nature of the excutive government therein be declared." The act then goes on to prescribe of what the executive of the central government shall consist, after that of what the legislature, called parliament,shall consist. It then follows the same form of legislation for the local constitutions. It would seem then beyond question that this act was attributing plenary governmental powers with regard to certain matters to both the federal and local bodies, and so far as I know this has never been doubted. We have therefore one point settled. The local organizations are governments. They enjoy regallian powers, and all the incidents of such powers. But it is said these powers have been limited by the charter, which has specially passed on the taxing power, and has been silent as to the taxing powers of indirect taxation. To the last part of this argument,

that is to say that the right to tax generally has not been expressly taken away, it has been said that by sub-section 3, section 91. " The exclusive authority of the parliament of Canada extends to the raising of money by any mode or system of taxation," and it is further provided that " any matter coming within any of the classes of subjects enumerated in this section (*i. e.*, section 91, of which taxation is one) shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of classes of subjects by this act assigned exclusively to the legislatures of the provinces," and that this is an express and not an implied taking away of the general right to tax. This is a formidable position. To the federal parliament exclusive authority is attributed, and the exclusiveness so given over rides even the declaration attributing exclusive power to the local legislatures. That is, the exclusive power of the former is absolute, that of the latter is subject to the condition that it shall not clash with the former. It is not easy to conceive words more clear than those of the B. N. A. Act to express this idea, nevertheless it has been universally admitted that this interpretation cannot be put upon the statute. In the case of l'Union St-Jacques *vs.* Belisle, decided in 1874, Lord Selborne explained the necessity of reconciling the two enumerations. In 1877, in the case of Angers *vs.* The Queen Insurance Company, I drew attention to this necessity, in these words: " It would be a defensible position to say that the proviso of section 91 so controlled sub-sections 2 and 9 of section 92 as to render them inapplicable, although I do not think this was the intention of the Imperial parliament. But the majority of the court does not adopt that view. * * The whole of the judgment about to be rendered affirms this, that the particular mode of levying a license adopted in the statute before us is beyond the powers of the local legislature (1 Cartwright, 131), and as I have already shown, it is that alone the P. C. held in confirming the

judgment of this court. (*Ib.*) They therefore impliedly rejected the short way out of the difficulty as inadmissible. Later, in 1880, in the case of Doble *vs.* The Temporalities Board, I argued that section 92 must be read with section 91, so as to modify the generality of sub-section "13 Property and civil rights in the province." The judgment of this court was reversed in the sense of the dissent, and no disapprobation of this doctrine was expressed. The following year the P. C. in the case of the Queen's Ins. Co. *vs.* Parsons, by a similar process of reasoning restrained the generality of section 9, sub-section 2. "The regulation of trade and commerce," in order to give scope to the local power over property and civil rights and l'Union Saint-Jacques and Bélisle and Cushing and Dupuy were referred to as being in the same sense. Further more, the Privy Council enunciated the doctrine of progressive interpretation, to which I have already alluded in this opinion. To this it is answered — true so far, a general power will be restrained to give scope to a special power. This distinction does not meet the cases. In the case last mentioned, two powers, general and exclusive, one attributed by section 91, the other by section 92, somewhat in conflict were compelled to live together. In Cushing and Dupuy it was a conflict of powers equally general. Palpably the double enumeration enacted for "greater certainty" is a faulty construction, and it becomes necessary for us to carry out the intention of the legislature, to find a *modus vivendi.* We are not to construe the statute so as to make our intentions impossible; we are not to lay down a rule which "followed up to its consequences would go far to destroy that power (the provincial) in all cases," as Lord Selborne has said. (Cartwright 7.) This must be the language of every jurisconsult; and it is thus the great judges of the United States have dealt with their constitution. As an instance, in the case already cited

of Hylton *vs.* the United States, Chase, J. said : " The rule of apportionment (an express rule of the constitution) is only to be adopted in *such* cases where it can *reasonably* apply." I shall make four quotations from the case of the Citizens Insurance Company and Parsons to show that the Privy Council has applied the same freedom of interpretation, and has held that, in spite of the absolute form of sections 91 and 92, the courts will read them together and modify one or the other or both to meet the general requirements of the act, and to attain the ends parliament must be supposed to have had in view.

" But it must have been foreseen that this sharp and definite distinction had not been and could not be attained, and that some of the classes of subjects assigned to the provincial legislatures unavoidably ran into and were embraced by some of the enumerated classes of subjects in section 91."

" Notwithstanding this endeavour to give pre-eminence to the Dominion parliament in cases of a conflict of powers, it is obvious that in some cases where this apparent conflict exists, the legislature could not have intended that the powers exclusively assigned to the provincial legislature should be absorbed in those given to the Dominion Government."

" It could not have been the intention that a conflict should exist, and, in order to prevent such a result, the language of the sections must be read together, and that of one interpreted, and where necessary modified by that of the other."

" It becomes obvious, as soon as an attempt is made to construe the general terms in which the classes of subjects in sections 91 and 92 are described, that both sections and the other parts of the act must be looked at to ascertain whether language of a general nature must not, by necessary implication or reasonable intendment, be modified and limited." (Cartwright, 271-2-3-4.) But it may be still further urged that the majority of the court is endea-

vouring to restrain the particular power of sub-section 3, section 91, by the general sub-section 16 of section 92. To this I answer that it is not the generality of the terms in which a power is conveyed that decides as to its nature, so in L'Union St. Jacques and Belisle it was the general sub-section 16 of section 92 that qualified and restrained sub-section "21, Bankruptcy and Insolvency," precisely as the court does in this instance. I need hardly add that the court does not contend that sub-section 16 could prevail if it were incompatible with sub-section 3. But this it cannot be, unless we hold that there cannot be double taxation, which is untenable, (Bemis et al. and Board of Alderman of Boston, 14 Allen, 368.) Besides the power of double taxation is expressly recognized by the act. On the main question as to whether there is any other power to tax except by way of license than that set forth in sub-sec. 2, the case of Dow vs. Black, seems to furnish some authority. Sir James Colville, in pronouncing the judgment of the Privy Council said :— "Their lordships are further of opinion with Mr. Justice Fisher, the dissentient judge in the Supreme Court, that the act in question, even if it did not fall within the 2nd article (of sect 92), would clearly be a law relating to a matter of *a merely local or private nature* within the reading of the 9th article of section 92 of the Imperial Statute" It is evident the learned judge meant the 16th article of section 92, for he had just declared that article 9 had "obviously no bearing on the present question." Again the words "of a merely local or private nature," are not used in article 9, they are used in article 16 and in no other part of section 92, and lastly, if this is not enough, to agree with Mr. Justice Fisher, article 16 must have been intended, for that learned judge said, "It also appears to me that the act 33 Vic., c. 47, comes within the category of powers provided for in the 16th clause of the 92 section of the B. N. A. Act, 1867, being purely a matter of a local nature." It seems to me then, that it is safe to say that

Dow and Black lays down the principle as formally as it can be laid down (barring only the slip as to the number of the sub-section), that the sub-sections 2 and 9 do not exclude from the powers of the local legislatures the right to propose other forms of taxation.

The learned Chief Justice has referred to the case of Dow and Black as though it were an *obiter dictum*. It is true it was not necessary for their lordships to speak of this, but is was scarcely *obiter* for it was before them, and it had formed a ground of dissent in the court below.

While the argument in this case was going on, we learned by telegraph that the privy council had confirmed the decision of the Supreme Court in Loranger and Reid. I have not been enabled to see what their lordships said in that case except through the medium of newspaper reports, from which I am not disposed to take the decision, inasmuch as it is usual for the Privy Council to submit a report in writing, which lays down precise propositions. And in any case, the report, such as we have it, does not affect my opinion in this case. If the 10 cents tax was a tax at all, it was not direct taxation, within the meaning of the B. N. A. Act. In Mr. J. S. Mill's opinion its character would only be determined with the end of the litigation, and when it was decided who should pay the costs of filing the exhibit. I am not, however, of the opinion the *jus edicendi* which the Chief Justice of the Supreme Court seems to think to be possessed by courts can possibly go to the extent of compelling us to accept, as an admitted truth, the so-called science of political economy as laid down by M. Mill, and lest my indocility to accept such doctrines may appear presumptuous, I shall quote two paragraps from Mr. Jevons, "Theory of Political Economy," one from his preface, the other the concluding sentence of the work, dealing with Mr. Mill's claims to be considered the high priest and prophet of political economy, and with the so-called science as known : "The contents of the following pages

can hardly meet with ready acceptance among those who regard the science of political economy as having already acquired a nearly perfect form. I believed it is generally supposed that Adam Smith laid the foundations of this science; that Malthus, Anderson and Senior added important doctrines; that Ricardo systematised the whole and finally, that Mr. J. S. Mill filled in the details and completely expounded this branch of knowledge. Mr. Mill appears to have had a similar notion; for he distinctly asserts that there was nothing in the laws of value which remained for himself or any future writer to clear up. Doubtless it is difficult to help feeling that opinions adopted and confirmed by such eminent men have much weight of probability in their favor. Yet, in the other sciences this weight of authority has not been allowed to restrict the free examination of new opinions and theories; and it has often been ultimately proven that authority was the wrong side." Theory of Political Economy, W. S. Jevons, page v.

THE NOXIOUS INFLUENCE OF AUTHORITY.

" I have but a few words more to add. I have ventured in the preceeding pages to call in question not a few of the favorite doctrines of economists. To me it is far more pleasant to argue than to differ; but it is impossible that he who has any regard for truth can long avoid protesting against doctrines which seem to him erroneous. There is ever a tendency of a most hurtful kind to allow opinions to crystallise into creeds. Especially does this tendency manifest itself when some eminent author, with the power of clear and comprehensive exposition, becomes recognized as an authority on the subject. His works may possibly be far the best which are extant; they may combine more truth with less error than we can elsewhere find. But any man err, and the best works should ever be open to criticism. If, instead of welcoming inquiry and criticism, the admirers of a great

author accept his writings as authoritive, both in their excellences and defects, the most serious injury is done to truth. In matters of philosophy and science, authority has ever been the great opponent of truth. A despotic calm is the triumph of error; in the republic of the sciences sedition and even anarchy are commendable. *Idem*, page 265.

In Loranger and Reed I do not learn from the report I have seen that the decision of the P. C. in Dow and Black has been distinctly over-ruled. Until this is done so in precise terms I shall continue to hold that the local legislatures may impose taxation by other modes than those set forth in sub-sections 2 and 9 sec. 92. In arriving at this conclusion I am satisfied to think that the most obsequious case-lawyer could not confine himself more completely within his self-constituted prison than the majority of this court has confined itself within the bounds of precedent. It is also pleasing to know that in a great part of their judgment there is unanimity in the court. We all reject the pretented scientific meaning of direct taxation, and this, I hope will check the objectionable practice of reading books that are not authority in court. Where we differ is as to the nature of the tax and as to the power of the local legislature to collect indirect taxes. I have not alluded to the argument of the possible abuse of the taxing power, that can be checked by the power to disallow possessed by the federal authority. We are to maintain the taxes in all the cases, and consequently the judgments in the five bank cases will be reversed and in the four other cases the judments will be confirmed.

OPINION OF M. JUSTICE CROSS.

Cross., J., said the observations which he was about to make were prepared more particularly in the case of Lambe and the Ontario bank, but the remarks and con-

clusion he had arrived at were equally applicable to all the cases. His honor proceeded as follows:—

William B. Lambe, license inspector for the revenue district of Montreal, sues the Ontario bank as a corporation having its place of business in the city and revenue district of Montreal, claiming $1,200 as a tax upon their banking capital of $1,500,000 and an additional tax of $100 for having an office or place business in the city of Mont real, said taxes being claimed as imposed and due under the Statute of Quebec, 45 Vic., cap. 22, entitled. An act to impose certain direct taxes on certain commercial corporations, and which by sec. 3 declares that the annual taxes imposed upon and payable by the commercial corporations mentioned and specified in section one of this act shall be as follows: 1st. Banks. Five hundred dollars when the paid-up capital of the bank is five hundred thousand dollars or less than that sum; one thousand dollars when the paid-up capital is from five hundred thousand dollars to one million dollars and an additional sum, of two hundred dollars for each million or fraction of a million dollars of the paid-up capital, from one million dollars to three million dollars, and a further additional sum of one hundred dollars for each million or fraction of a million dollars of the paid up capital over three millions. To this action the Ontario bank pleaded to the effect that by section 91 of the British North America Act of 1867 the exclusive legislative authority of the parliament of Canada extended among other things to; 2. The regulation of trade and commerce; 3. The raising of monies by any mode or system of taxation; 15. Banking. The incorporation of banks and the issue of paper money. By section 92 of the same act in each province, the legislature might exclusively make laws for among other things: 2. Direct taxation within the province, in order to the raising of a revenue for provincial purposes, beyond which no power of taxation was granted to the legislature of any province. The Ontario bank held its charter under the Dominion

statute, 34 Vic., cap. 5, entitled " An act relating to banks and banking, amended by subsequent acts. Their capital of one million five hundred thousand dollars was held and owned by shareholders whereof two-thirds resided out of the province of Quebec. Their chief place of business was in Toronto, Ontario, where more than two-thirds of their capital was employed, and about a third in the province of Quebec; that under the powers conferred by their charter they did business and had offices and agencies throughout the Dominion and beyond the Province of Quebec; that the tax in question was not direct within the meaning of said 92nd section of the British North America Act. It interfered with the regulation of trade and of banking by imposing restrictions thereon; that it porported to be regulated by the amount of the paid-up capital used and held beyond the limits of the province; it was unjust, partial and discriminating against one set of persons for the benefit of another set. That by reason of what was so pleaded the act of the legislature of Quebec, under which said tax purported to be imposed, was illegal, unconstitutional and *ultra vires*. The demand being based on the provincial statute to which it refers, and there being no dispute about the facts set forth in the plea, an admission was made of the essential statements it contained, and the issues thus raised were submitted upon arguments made by the parties to the Superior Court, which, by its judgment, held that the statute of the province of Quebec, 45 Vic, c. 22, in so far as it imposed the tax in question, was unconstitutional and *ultra vires*. Hence the present appeal brought by the license inspector. A preliminary question was raised, that the statute of Quebec invoked was a nullity and had no existence in law, because passed in the name of the Queen in place of the legislature of Quebec. I have not throught it necessary to discuss this point, having no doubt that the statute was formally sanctioned by all the legislative power of the province and so sufficiently

appears on the face of it. I think I am warranted in not treating this point as serious. The main question raised is purely one of law, viz.: Whether the statute of Quebec 45 Vic. cap. 22, in so far as it imposes the tax in question is within the power of the provincial legislature. The debatable ground as to the relative powers of the Dominion and provincial legislatures has been narrowed by the number of decisions which have been rendered on subjects nearly approaching the one now under discussion. In Severn *vs.* the Queen, 2 Supreme Courts Reports, p. 70, a provincial statute requiring a brewer to take out and pay a sum of money for a licence for permission to carry on his business was held to be in conflict with the power of the Dominion parliament to regulate trade, and also that it was an indirect tax. In the case of the attorney-general *vs.* The Queen Insurance Co., 3 L. R. H. of L. and P. C., cases p. 1,097, it was held that the statute of Quebec the Quebec License Act of 1875, 39 Vic., c. 7, was virtually a stamp act, and that the tax thereby imposed was an indirect tax. In the case of the Citizens Insurance Co., *vs.* Parsons, 7 L. R. H. of L. and P. C. cases, p. 109, it was held that the terms, property and civil rights 13thly enumerated in sec. 92 of the British North America Act, included rights arising from contracts where not explicitly mentioned as comprised in any of the powers conceded to the Dominion Legislature under sec. 91, that for the protection of property and civil rights within the province, a local legislature could impose conditions to contracts of insurance becoming operative within the province. In Russell *vs.* the Queen, 7 L. R. H. of L. and P. C. cases, p. 335, it was determined that the Canada Temperance act of 1879 does not belong to the class of subjects included by the denomination of property and civil rights in the enumerations of powers attributed to the provincial legislatures by sec. 92 of the British North America Act. In the city of Frederickton *vs.* the Queen, 3 Supreme Court reports, p. 505, it was determined that

the Canada Temperance act of 1878 was within the competency of the Dominion legislature which alone had the power to pass such an act in virtue of their power to regulate trade and commerce. In Hodge *vs.* The Queen, 9 L. R. H. of L. and P. C. cases, p. 117, it was held that the Ontario License Act of 1883, authorizing the adoption of resolutions in the nature of police or municipal regulations or by-laws, fixing the hour for selling liquors and keeping open billiards tables, were of a local character for the good government of taverns, &c., and did not interfere with the general regulation of trade and commerce, and was within the powers of the provincial legislature. These decisions still leave considerable room for discussion as to the relative powers of the Dominion and Provincial legislatures, and the fixing of an exact line of demarcation between them, which it appears difficult to reach on any general principle, and has consequently in part to be considered in relation to each individual case which seems to present a doubt, and that now under discussion may be fairly reckoned as one of such cases, that is a case not wholly settled by any previous decision, although its determination is doubtless aided by the principles laid down in the previous decisions. It is therefore yet an open question whether the tax in question imposed in virtue of the statute of Quebec, 45 Vic. cap. 22, purporting to authorize the levy of what it terms direct taxes on the paid-up capital of banks, doing business within the province, is *ultra vires*, and whether said statute in so far as it purports to impose such tax, is unconstitutional. It be may assumed that the power of taxation by an independant sovereign state is unlimited as regards the persons and property falling within its jurisdiction. The powers we have to consider are derived from a plenary source, and have to be construed as falling within the limits of the grant by which they are conferred. Whether the powers conveyed are in aggregate plenary, being distributed, that is divided between two

authorities, the Dominion and the provincial, they cannot be plenary to each, but the division has been so contrived as to be in part exclusive to each, and in some particulars it must be conceded. common to each. The terms in which these powers are conveyed are of necessity very general for the most part, and although as regards certain of them, a clear distinction may be obvious, yet there are others which seem to run into and overlap each other, rendering it difficult to obtain a clear line of demarcation.

The powers of the provinces are exceptional and are enumerated, save as to No. 16, which comprises generally all matters of a merely local or private nature in the province. The powers the Dominion are general. " To make laws for the peace, order and good government of Canada in relation to all matters not coming within the class of subjects assigned exclusively to the provinces, but for certainty, although not to restrict the generality of the powers conceded, an enumerated class of subjects under twenty-nine heads are assigned exclusively to the Dominion, none of which subjects are to be deemed of a local or private nature, as assigned to the provinces under section 92. It follows that the powers of the provinces are restricted to those especially enumerated in section 92 as assigned to them, and are limited by the terms and conditions on which the concession is made. Where exclusive powers seems to have been given to both as in the case of direct taxation, then the provisions so conflicting must be read together as to give reasonable effect to both, especially where such seems necessary for the working of the act. With the aid of these references drawn from the terms of the statute and making allowance for the ground covered by the decided cases, there is still much room for controversy in the cases that are continually arising in relation to these relative powers. The experience of the United States of America and the judicial decisions rendered there on constitutional questions, are naturally looked to as of value in solving questions aris-

ing under our constitution. One consideration of importance to be kept in view in the application of decided cases there, as precedents for us, is that with them each state was considered as originally possessed of sovereign authority over persons and property within its jurisdiction. That in forming their confederation all powers not specially conferred or surrendered to the general government were reserved to the States. The British North America Confederation proceeds from an opposite standpoint, on the opposite theory, providing, as in effect it does, that all powers not expressly conferred on the local or provincial legislatures are attributed to that of the Dominion. The power of the state governments in the United States is relative to the United States government greater than that of the provinces to the Dominion, yet it has been held uniformly by the Supreme Court of the United States, that the general government was possessed of certain implied powers convenient or necessary for carrying on the functions of the government, and that within their sphere, the government of the Union was supreme. Cooley, on Taxation, at p. 57, No. 3, says the means or agencies provided or selected by the federal government as necessary or convenient for the exercise of its functions, cannot be subject to the taxing power of the states. The states cannot tax a bank chartered by congress as the fiscal agent of the government, in support of which, he cites the case so often referred to, of McCullough *vs.* The State of Maryland *et al.*, 4 Wheaton Supreme Court reports, p. 316, where it was held that the state government had no right to tax any of the constitutional means employed by the government of the Union to execute its constitutional powers. The states had no power, by taxation or otherwise, to retard, impede, hinder, bind, or in any manner control the operation of the constitutional laws enacted by congress to carry into effect the powers vested in the national government. The bank in question in that case was a quasi commercial enter-

prise owned in great part by private shareholders, yet it was chartered as a United States bank, and was the financial agent of the government. C. J. Marshal, who pronounced the judgment, among other remarks stated in effect, that although no express authority was given by the constitution of the United States, either to create corporations or to establish banks, and although it was conceded that the inherent power of taxation remained with the people of each state to the full extent to which it had not been alienated. Although the federal government itself could exercise no powers but those granted to it, which were enumerated powers, yet the government of the union, limited as it certainly was, nevertheless was supreme within its sphere ; that although among their enumerated powers were not to be found that of establishing a bank or creating a corporation, yet as an attribute of sovereignty it could create corporations, and as a means to carry into effect the objects of the government with which they were entrusted, it could establish banks, and the agencies of these banks throughout the United States were not subject to taxation by the state power ; that the act to incorporate the bank of the United States was made in pursuance of the constitution, and was part of the supreme law of the land ; that the tax imposed on this bank by the state of Maryland was incompatible and repugnant to the constitutional laws of the union ; that it was a franchise created by the United States Congress within their exclusive attribute of powers, and what they had a right to do, the state government had no right to undo ; that the power of the United States to create, implied a power to preserve ; that a power in the state of Maryland to tax the bank created by the United States would be a power to destroy, and if wielded by a different hand would be incompatible with the power to create and preserve ; that when such repugnance existed the authority which was supreme should control and not yield to that over which it was supreme. He further remarked : If the states

could tax one instrument employed by the government in the execution of its powers, they might tax any and every other institution. They might tax the mail ; they might tax the mint ; they might tax patent rights ; they might tax the papers of the custom house ; they might tax judicial proceedings : they might tax all the means employed by the government. It was, however, conceded in that case that the denial of the state power to tax did not extend to the real estate of the bank, nor to the interest of the shareholders resident within the state imposing a tax upon their property in shares. In Weston *vs.* Charleston, 2 Peters' R., p. 467, it was held that the state legislature could not, by taxation or otherwise, retard, impede, burden or in any manner control the operation of the constitutional laws enacted by congress to carry into execution the powers vested in the general government. In the case of Osborn *vs.* The Bank of the United States (9 Wheaton, 738), it was held that a state cannot tax the Bank of the United States, and that any attempt on the part of its agents and officers to enforce the collection of such tax against the property of the bank would be restrained by injunction. In Brown *vs.* The State of Maryland, 12 Wheaton, 448, C. J. Marshall says : We admit the power to be sacred, the state power to tax its own citizens or their proporty within its own territory, but we cannot admit that it may be used so as to obstruct the free course of a power given to Congress. In the case of Railroad Co. *vs.* Penniston, 18 Wallace, U. S. R. p., it was held by a majority of the judges that a tax upon the operations of a railway company, incorporated by Congress to run through several states, imposed by the state on property of the company within the state, was valid, but a tax upon the operation of the company being a direct obstruction to the exercise of federal power could not be allowed, thus making a distinction between a tax on the franchise and a tax upoa the property. The minority of the judges were of opinion that the tax even on

the property of the company, although within the taxing state, was invalid. In applying to the present case the principles that run through these decisions, I think it must be assumed that where by the British America Act, the Dominion government are given an exclusive power, it stands in the same relation to the power, and is entitled to the same protection from the courts as the power conceded to the Congress of the United States for the exercise of theirs functions of government. Moreover, we find no instance where an express power given to the Congress of the United States has been, by the sanction of the courts, interfered with by taxation or otherwise by the state power. If the power of the Dominion legislature be exclusive for the regulation of trade and commerce, and in the matter of banking and the incorporation of banks, and the power of the provincial legislatures limited to to direct taxation and the issue of certain classes of licenses, it follows that banks created by the Dominion legislature for the purpose of doing business throughout the Dominion cannot be taxed, retarded, impeded, burdened or in any manner controlled by the operation of any enactments of the provincial legislatures. The same should hold good as regards the regulation of trade and commerce, at least as to general trade and commerce of public or general interest to the Dominion. This is evidently the view adopted on the subject in the United States. Cooley, at p. 162, remarks : When, therefore, it is held that a power to tax is at the discretion of the authority which wields it, a power which may be carried to the extent of an annihilation of that which it taxes, and therefore, may defeat and nullify any authority which may elsewhere exist for the purpose of protection and preservation, it follows as a corollary that the several states cannot tax the commerce which is regulated under the supremacy of Congress. Burroughs on Taxation, p. 93, sec. 64, Regulation of Commerce. The constitution provides that Congress shall have power to regulate com-

merce with foreign nations, and among the several states, and with the Indian tribes. * * * The doctrine is now firmly established that the taxing power of the States, while it may be exercised upon all property within their limits, upon the goods carried or the instruments of commerce as property, and thus indirectly affect commerce, yet where the tax law amounts to a regulation of commerce, it is void, because in conflict with the power granted to Congress, which when exercised is exclusive and supreme. It was admitted in these American cases, as, in fact, the powers by the constitution reserved to the states, permitted each of the states the right to create banks and other corporations of thier own, and to tax such institutions of their own creation, but the power to tax a United States bank as such—that is, on its existence or its operation, in other words, its franchise or capacity to do business—was always denied and held to be unconstitutional. If, therefore, a bank of the United States could not be taxed by state power, nor thereby retarded, impeded, hindered, or in any manner controlled, by the same process of reasoning it follows that in a matter where the Dominion government has been attributed exclusive authority, the provincial government cannot be permitted to render its exercise nugatory by assuming to tax the legitimate operations of that Dominion government acting within the sphere of its attributes. The same rule should hold good where the tax affects trade and commerce, at least the general trade of the country. The provincial statute 45 Vic., cap. 22 in question, is the renewal with an extension of the subjects of the attempt made to raise revenue from insurance companies under the statute of Quebec 39 Vic., c. 7. The proposed exaction being now by the former of these acts styled a direct tax, the first attempt proved futile, the tax being held unconstitutional by the decision in the case of the attorney-general *vs.* The Queen Insurance Co. The fact that it is now called a direct tax, will not alter its nature, nor do I think

add to its validity. It seems to me that the tax in question is open to a further objection by the want of territorial jurisdiction in the Quebec legislature over the subject of taxation. By the terms of enumeration 2 of sec. 92 of the Bristish North America Act " direct taxation within the province," the provincial legislature is not entitled to exercise its taxing power on objects beyond the territorial limits of the province. The statute of Quebec 45 Vic., cap 22, sec. 1 purports to impose the tax on every bank carrying on the business of banking in this province and under sec. 3 the rate of tax is scheduled according to the amount of its paid-up capital. The respondent is a bank incorporated by act of parliament and holds its present charter under the Dominion statute 34 Vic., cap. 5 and amendements. Its head office is at Toronto, in Ontario. Its paid-up capital is located at Toronto, and so far as being provincial property is within the juridiction of Ontario. It is true that it is represented in the Province of Quebec by its agents there and it employs some of its capital in the Province of Quebec. These agents and the capital employed in the Province of Quebec are within its local jurisdiction, and as such may be proper subjects of taxation within its provincial power, but they are not taxed as such, on the contrary, it is the paid-up capital of the bank, its franchise or capacity to do business which is attempted to be taxed, and which is not within the jurisdiction of the Province of Quebec. If the franchise or capital were taxable within the Province of Quebec, it would be much more legitimately taxable in Ontario, and would be equally taxable in each of the provinces in which the bank might open an agency, so that it might come to be taxed for the necessities of seven several provincial governments as well as liable to a like visitation from the federal power. This again would not interfere with direct taxation of its property within the province. In such case would all or any of these taxes be direct ? and if any, which ? Now, although duplicate taxation is

not impossible, the law generally presumes against it even within the same jurisdiction, see Cooley on Taxation, p. 105, nor do I think that it would be tolerated that by coercion of the agency within its limits, a provincial government could lay a tax on a franchise or property beyond its limits. A government with plenary powers might exercise such indirect coercion, but it is altogether inapplicable to the circumstance of the present case. The principle of confederation necessarily implied that one province would not interfere with the taxable subjects or property of another province, hence the qualifying words " within the province " in No. 2 of sec. 92 include this limitation, which would have been implied from the circumstances had even this express qualification been omitted. Cooley at p. 15 says the power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the state. These subjects are persons, property or business. And at p. 14 he says taxation and protection are reciprocal. A personal tax cannot be assessed against a non-resident ; neither can the property of a non-resident be taxed unless it has an actual situs within the state. In the case of Leprohon *vs.* The City of Ottawa, 1 Cartwright, p. 635, in the Court of Appeals, Ontario, Mr. Justice Paterson says : The restrictions confine such taxation within the province. I think this has not been questioned. The paid up capital of a bank is necessarily a very fallacious data for taxation. At the very outset of the business of the bank the capital must of necessity have been diminished by preliminary expenses. If prosperous in business its assets must come to exceed its paid up capital, if the reverse its paid up capital is an unfair basis of taxation. When the franchise is taxed it is usually on its estimated value as a facility for doing busines. In Burroughs, on taxation, at p. 164 he says : The right of the corporation to exist and exercise the powers vested in it by its charter is called its franchise ; and at p. 166 § 85,

Tax on the franchise. This tax is in its essential nature the same as the license tax. and the same principle as to the powers of the state to tax applies to domestic corporations when they are first chartered as applies to foreign corporations. Again, at p. 174 § 87. Capital, how taxed (that is of corporations). Corporations are sometimes taxed on their nominal capital and sometimes on its actual value. When taxed on its nominal capital, the tax is on the whole amount paid in or secured to be paid without reference to losses. The capital is referred to as a measure of the price to be paid for the franchise. In the case of a foreign corporation the bonus or tax is the amount paid for the privilege of exercising its corporate powers in the state; In the case of a domestic corporation it is the amount paid as the price of its corporate existence. It only exists by the permission, and the state may prescribe the terms on which it will grant its permission. From this it would appear to have been held in the United States that the state power can tax the franchise of a corporation created without the state, but only on the ground of its being a license or permission to do business within the state, but the taxing power of a state, exceeds that of a province. It extends to the regulation of trade in the state and to all powers of taxation not expressly surrendered by the state. It is not, by its charter limited, to taxation within the state. This doctrine, I apprehend, would be inapplicable to the circumstances of the provinces and their relations to the Dominion. It would be likely to lead to mischief, and I think ought to be open to question even in the United States. In the case of Paul *vs* Virginia, 6 Wallace, p. 168, it was held that corporations were creations of local law, and had not even an absolute right of recognition in other states, but depended for that and for the enforcement of their contracts upon the assent of the state (where their contracts were sought to be enforced), which might be given accordingly on such terms as they pleased. In the present case what has been

attempted to be taxed has not been brought within the jurisdiction of the legislature of the Province of Quebec The tax is on its paid-up capital whose situs is without the province. As to whether the tax is direct or indirect, I entertain no doubt in my own mind that it is in its nature a very indirect tax. It is not on property nor on persons and it has to be collected not directly from the object taxed, but indirectly by operating on the agency and property which the corporation may have in the province, not certainly from its franchise or paid-up capital, therefore to my mind very manifestly indirect, but on the general question as to what are direct and what are indirect taxes, I have found it difficult to arrive at any well defined recognized line of distinction. As near as I can arrive at what should be reckoned a direct tax, it is one levied immediately on property or persons and perhaps on income. I doubt whether in any case a tax on a corporation or company as such, that is on its capacity to exist and to do business, could be ranked in either of those classes. If its proper situs were without the jurisdiction of the taxing power, it could not be legally taxed. In any case its shares held within the province and any of its property there situate, would as such be liable to taxation in the same manner as other property pertaining to individuals. The taxation of domestic corporations and companies would be open to the objection of duplicate taxation, and would, to my mind, be an indirect tax, as one in the nature of a licence imposed upon their capacity to exist and do business, and which would have been classed as a license tax had it been intended to empower the levying of it, on the provincial government. I am not quite certain that their lordships of the Privy Council did not intend to decide squarely in the case of the Attorney-General *vs.* The Queen Insurance Company, that a tax of the nature of the one now in question was unconstitutional in whatever form imposed, whether called a direct taxor by whatever name it was intended to belevied. They

certainly ruled in that case that the tax was indirect, and as regard classification I cannot distinguish it from the one now in question. They also held that the act in question was virtually a stamp act, although in name a license act. The case of Severn *vs.* the Queen seems also directly in point. Whoever remembers the general sense in which the subject was discussed in the press and by politicians before and at the time of confederation, will have little difficulty in recognizing the nature of direct taxation as then understood, at least in the then province of Canada. The charges of government had been sustained for the most part by customs duties on imports, to which something had been added by the licence power. Except for the most part in the cities, there had been no imposts on property or persons. As expenses of the government increased, there was an apprehension that these might have to be resorted to. A resort to this mode of raising revenue was looked upon as an extreme measure, and one likely to be very unpopular, but of possible necessity, not likely to be resorted to so long as the government could exist and carry on its fonctions by only taxing imports. In forming the confederation the danger must have been foreseen of allowing the local governments the power of indirect taxation. It would obviously be their interest to exist and defray their charges by imposts upon the trade of the country, more especially the through trade, and their inclination would naturally lead them to avoid a direct charge on their constituents. It was of importance that trade should not be embarrassed by local burdens hence its regulation was assigned to the Dominion. I cannot think that a tax upon corporations or companies as such, can be considered a direct tax, more especially on those having their proper situs without the province, nor can such tax be held legal in the face of the other reasons already stated. I therefore concur in the judgment rendered in this case by the Superior Court. I hold that the tax in question in this cause is unconstitu-

tional and void, and that the judgment of the Superior Court in this case should be confirmed. I am, however, with the Chief Justice in the minority, as regards the opinion entertained by this court.

TESSIER, J. :

Après les longues dissertations faites par mes collègues qui m'ont précédé et les nombreux précédents et autorités qui ont été cités et commentés, il est assez évident que la matière est épuisée et je ne veux pas m'exposer à faire des observations qui ne seraient qu'une répétition de ce qui a été dit.

Je me contenterai de mentionner brièvement les propositions qui résument mon opinion.

1. L acte de la Confédération a conféré des pouvoirs distincts en certains cas et des pouvoirs concurrents en certains autres cas au parlement fédéral et aux législatures provinciales.

Les législatures provinciales sont des gouvernements qui ont les droits et priviléges inhérents à l'exercice d'un gouvernement; la mention spéciale de certains droits particuliers dans la section 92—n'est qu'énonciative, surtout en considerant la sous-section 16 qui dit : " et gené-
" ralement toutes les matières d'une nature purement
" locale ou privée dans la Province."

Le droit de taxer pour prélever un revenu et payer les dépenses publiques n'est pas un attribnt de la souveraineté sous la constitution anglaise, mais un droit inhérent des parlements et législatures qui sont des gouvernement représentatifs du peuple.

Dans la cause de *La Reine et Hodge*, l'un des juges du Conseil Privé s'est exprimé ainsi :

" Dans les limites de sa juridiction et dans la sphère de
" ses pouvoirs, la législature locale est suprême et a la
" même authorité que le parlement impérial ou le parle-
" ment de la Puissance auraient dans les mêmes circons-
" tances pour conférer à une institution municipale, ou à
" un corps de sa création, l'autorité de faire des règle-

" ments ou de passer des résolutions relatives aux sujets " spécifiés en cette section ou pour la mettre en opéra- " tion et en assurer l'effet."

2. La taxe en question en cette cause est une taxe directe ; il est vrai que l'acte de la Confédération ne définit ce que c'est qu'une taxe directe, ni aucune de nos lois La présente taxe n'est, après tout, qu'une contribution mobilière ou une taxe mobilière qui n'est qu'une taxe directe.

Ce qui est le plus certain, c'est qu'à part la taxe directe sur les personnes ou la taxe indirecte sur les marchandises importées, c'est que sur toutes les autres taxes les économistes ne s'accordent pas et sont en contradiction, comme le dit Cooley, on Taxation, p. 5 : " The term direct " taxes is employed in a peculiar sense in the Federal " Constitution," en Angleterre, en France et aux Etats-Unis, lorsqu'il s'agit de les classer en taxe directe ou indirecte. Les définitions aux Etats-Unis ne peuvent s'appliquer ici, comme dit M. Leroy-Beaulieu, dans son " Traité de la science des Finances " tome 1er, p. 214 ; après avoir démontré que la définition des impôts *directs* et *indirects*, donnée par l'administration, dans différents pays, n'est pas toujours exacte, il propose la suivante comme étant la plus scientifique et la plus satisfaisante qu'il ait pu trouver :

" Par l'*impôt direct* le législateur se propose d'atteindre " immédiatement du premier bond et proportionnellement " à sa fortune ou à ses revenus, le véritable contribuable ; " il supprime donc tout intermédiaire entre lui et le fisc, " et il cherche une proportionnalité rigoureuse de l'impôt " à la fortune ou aux facultés.

" Par l'*impôt indirect* le législateur ne vise pas immédia- " tement le véritable contribuable et ne cherche pas à lui " imposer une charge strictement proportionnelle à ses " facultés : il ne se propose d'atteindre le vrai contribuable " que par ricochet,, par contre-coup, par répercussion : il " met des intermédiaires entre lui et le fisc, et renonce à

" une stricte proportionnalité de l'impôt dans les cas par-
" ticuliers, se contentant d'une proportionnalité relative
" en général."

M. Passy, qui a fourni au *Dictionnaire de l'Economie Politique*, publié par MM. Coquelin et Guillaumin, l'article traitant de *l'impôt*, dit aussi :

" C'est un usage reçu de diviser les impôts en deux
" catégories distinctes. On appelle *directs* ceux que les
" contribuables acquittent eux-mêmes pour leur propre
" compte : on appelle *indirects* ceux dont certains d'entre
" eux ne font que l'avance et dont ils obtiennent le rem-
" boursement des mains d'autres personnes."

Mill—*Principles of Political Economy*, Livre 5, ch. 3, sect. 1, nous dit :

" Taxes are either *direct* or *indirect*. A *direct tax* is one
" which is demanded from the very persons who, *it is*
" *intended or desired* should pay it. *Indirect taxes* are those
" which are demanded from one person in the expectation
" and intention that he shall indemnify himself at the
" expense of another : such are the *excice* or *customs*."

Walker—*Science of Wealth*, p. 338 :

" *A direct tax* is demanded of the person who, it is
" intended, shall pay it. *Indirect taxes* are demanded from
" one person, in the expectation that he will indemnify
" himself at the expense of others."

Tel est le systsme qui est le plus généralement adopté aujourd'hui.

Une compagnie incorporée n'est qu'une personne juridique dans le sens de nos lois ; cela est défini dans notre code civil, art. 17, sous section 11—" Le mot personne
" comprend les corps politiques et incorporés."

En interprétant ces définitions il me paraît évident que c'est une taxe directe sur la personne juridique ou légale qui paie directement la taxe. L'actionnaire est atteint directement, parce qu'il est confondu avec la corporation comme membre de cette corporation. C'est le capital commun de la corporation qui est taxé. Ce n'est pas une

licence ni une taxe sur la franchise, parce que rien dans cette loi en question n'empêche la banque de continuer ses transactions ; chaque part ni les affaires de la compagnie incorporée ne sont taxées.

3. Quelque soit l'opinion théorique des économistes sur les taxes directes ou indirectes, la taxe actuelle est une taxe que la législature de Québec avait le pouvoir d'imposer, en prenant l'ensemble de notre constitution. En disant que la législature a le droit d'imposer les taxes directes, il me semble qu'on a voulu simplement consacrer que les législatures provinciales n'auraient pas le droit d'imposer de taxes sur les importations, qui est le grand exemple reconnu de la taxe indirecte. En mettant la question, si la taxe en question en cette cause sera payée indirectement par d'autres, comme dans le cas de marchandises importées, on peut dire que cette taxe sur le capital des sociétés ou compagnies incorporées est une taxe directe qui n'affecte que la corporation et non pas les personnes qui font affaires avec elle. Les actionnaires et la compagnie incorporée ne font qu'un, c'est la même personne formant un être unique juridiquement.

Quant à l'objection que le capital des banques et autres compagnies incorporées est en plus grande partie situé hors de la province, c'est une objection spécieuse, mal fondée ; le capital d'une banque n'est pas divisible, il est censé exister en entier et répondre en entier pour les affaires où il y a un bureau ouvert. Par exemple, un déposant qui dépose mille piastres dans la Banque du Commerce à Montréal a droit de se fier à tout le capital de cette banque et a recours pour la remise de son dépôt contre le capital entier de la banque, quoique cette banque emploie une grande partie de son capital dans la province d'Ontario. Par un effet de la loi, une banque ou une compagnie incorporée transporte tout son capital dans tous les lieux où elle transige des affaires.

Il y a des actionnaires résidant nors de la province, en Angleterre, aux Etats-Unis, cela ne fait rien, il n'y a qu'un

être moral et juridique dans lequel sont confondus tous les actionnaires, n'importe où il résident. Par exemple, supposons que le parlement fédéral ait imposé la même taxe dont il est ici question, sur les banques, ces institutions pourraient-elles éviter de payer ces taxes, en alléguant que partie de leurs actionnaires demeurent en Angleterre ou ailleurs, et que partie de leur capital est engagée dans un de leurs bureaux établis en Angleterre ou aux Etats-Unis? Evidemment, cette objection serait rejetée; pourquoi ne le serait-elle pas, lorsqu'il s'agit de la même taxe imposée par la législature de Québec?

L'acte de la Confédération a été fait dans le but de concilier les intérêts et les droits de province pré-existant; cet acte doit être liberalement interprété. Ce n'est qu'une alliance fédérale, dans laquelle chaque province a été constituée avec un gouvernement régulier; ces provinces doivent raisonnablement et libéralement avoir le droit de se maintenir et de prélever les revenus nécessaires à leur maintien.

Si on eut voulu limiter les pouvoirs des législatures provinciales à certains sujets particuliers, pourquoi n'aurait-on pas défini ces pouvoirs et dit ensuite que tous les autres pouvoirs appartenaient au Parlement Fédéral. Au contraire, il a fallu spécifier dans la section 91 les pouvoirs particuliers de ce parlemeut dans certains cas, comme dans un traité entre deux parties indépendantes qui spécifie les droits appartenant à chacun des deux.

Les compagnies incorporées forment une classe générale de gens qui exercent dans l'Etat des priviléges de commerce sans être responsables sur leurs propres biens comme les autres individus, mais avec limitation de responsabilité. Ce n'est que juste qu'ils contribuent aux revenus de la province dans laquelle ils font affaires dans un but de profit.

A mon avis, l'acte de la Confédération est un modèle de législation que j'ai toujours admiré. Il a fallu un grand effort de science, d'intelligence et d'expérience pour avoir

compris dans une loi de 147 articles le règlement des intérêts si variés de plusieurs provinces couvrant un immense territoire, avec des systèmes de loi différents. Les termes généraux dont on s'est servi montrent qu'on a voulu donner une élasticité nécessaire dens notre constitution. C'est à nos tribunaux de donner une interprétation raisonnable pour concilier tous les intérêts et non pour créer et favoriser ceux qui sont disposés à élever des conflits.

Il me semble parfaitement raisonnable que ces compagnies incorporées, qui ont la protection des lois provinciales, qui profitent de nos lois de police et municipales, fournissent leur part de revenu pour le soutien de notre gouvernement provincial.

Je concours volontiers dans le jugement de cette cour, qui maintient cette taxe comme étant constitutionnelle ; elle n'est pas excessive, elle est raisonnable et justifiable, et je crois qu'elle doit être maintenue.

BABY, J. :—

At this late hour of the day, within a few minutes of the time fixed for the adjournment, it would be an *hors d'œuvre*, on my part, to attempt giving my opinion at full length, on the very important question at issue, and which have been so thoroughly ventilated by my learned colleagues. It would almost suffice for me to say, that I share generally in the opinions so ably enunciated by my learned brothers, Justices Ramsay and Tessier.

Nevertheless, I may add that my judgment rests principally on two points which have been brought out most conspiciously in the course of the discussion :—

1st. That this is a direct tax.

2nd. That, whatever the name by which it may be called, direct or indirect, the Legislature of the Province of Quebec had the power of imposing it within the Province, for local purposes.

In the first place, I say that the tax complained of here

is a direct tax, according to what is generally meant and understood in Canada by that term, and as I have always understood it when dealing with such a distinction in our system of taxation. I have not failed to make a careful examination of the numerous authorities quoted by counsel on both sides as to the classification into direct and indirect taxes. They all vary more or less, according to the country in which they were written or the particular school of political economy their authors represent. It would be an unnecessary task for me to review them now; it would be merely going over much of the ground already traversed by the learned judges, and be a repetition which could not even have the pretext of throwing a spark of light on the subject, as all seem to concur in the inapplicability of the doctrines of political economists in dealing with the matter before us.

By the statute sought to be set aside as being *ultra vires*, the tax in question is imposed directly on the Banks and other institutions therein named carrying on business within the Province of Quebec. They are all incorporated bodies for the most part, holding their powers either under federal and local legislation. Considerable efforts have been made to establish indiscriminately that no corporation of this kind could be directly taxed in its person. Now, if an ordinary person can be so taxed, I fail to see why a corporation could not be taxed in the like manner, as by our law, every corporation is a person (C.C. Art. 352).

It was argued in this respect that the tax in question might fall on foreigners or on capital owned totally or in part by persons residing out of the Province of Quebec and, therefore, it was not taxation "within the Province." This was followed up by another objection, viz: that the impost complained of was put on a capital that might not be found within the limits of the Province, in other words, that a foreign Bank carrying on its operation in Quebec had, most likely, but a very small proportion of

its capital engaged here, that it might, therefore, be taxed elsewhere, and the consequence would be that the same capital might be taxed several times over.

There is not much force, I think, in these two objections. In the first place these corporations have their legal domicile within the Province and from the moment they have taken it up they become undoubtedly amenable to its laws; and, in the second place wherever a Bank or like institution opens business, it must be readily admitted that it does so in its corporate name and as a whole; it is the corporation that acts and not a certain number of shareholders or a proportion of them, according to the amount of capital invested.

On the second point, I say that, even should this tax be not a direct one, the Legislature of Quebec had the right of imposing it in the exercise of one of its inherent powers. A people can undoubtedly tax itself through its legislators in Parliament assembled. Now, by the British N. A. Act, 1867, the several Provinces forming "The Dominion of Canada," at their own request, have been granted respectively a legislature with certain enumerated powers, The general powers of taxation cannot be impliedly taken away from them. It requires an express and clear enactment of the law to deprive them of what is a primary right. There is nothing of the kind, however, in the Act, which should be liberally interpreted, that is to say, in the same sense and spirit as it was framed and granted to us by the Imperial Parliament. Doing otherwise, would be taking to pieces and breaking up this great treaty, made and entered into between the various British N. A. Provinces, under the sanction and for the welfare of the Empire.

I am of opinion that the local legislature alone and exclusively have the right of imposing direct imposts within their respective provinces, to raise a revenue for provincial purposes, but this right given by the 92nd clause of the British N. A. Act, 1867, does not imply an abandon-

ment by them of all other rights of taxation, or a prohibition to them to levy money by any other mode or system of taxation within the province and for provincial ends. In other words, I read clause 91 and 92 of said Act—which have certainly to be reconciled—as giving to the Dominion or federal legislature the power of raising money by any mode or system of taxation, except provincial taxation for provincial objects, which is the right reserved to and conferred specially and exclusively on the local legislatures, but, at the same time, not depriving in any way the latter from exercising the right of taxing generally, for the objects for which there were created, and which has not been taken away from them expressly or impliedly.

I am aware that this interpretation of the Statute has not been accepted in certain quarters, but I cannot see—to be practical—how any other can be given.

It has also been stated that this is an excise tax and, therefore, did not fall within the jurisdiction of the local legislature. I fail to see how it can be construed into such a tax. By excise, is generally understood the impost put on the home products manufactured or otherwise. The taxes put on spirits, tobacco, malt, flour, coal, have always been considered as excise duties in Canada and no other kind of tax. The very name signifies this. There is no parity here.

We have it said this tax is inopportune, unreasonable, unjust· Whether it be so or the reverse is not for this Court to decide—that is the political side of the question and not the legal. The tax may be perfectly legal on the one hand, and quite inopportune on the other. It rests then with the people to decide, by their representatives in Parliament whether it should be abrogated or not. I hold, moreover, that it does not fall within our domain to set aside a tax imposed by a proper authority because the same may happen to clash—some way or other—with the powers of taxation appartaining to another branch of our political organization.

On the whole, I am for confirming the judgments which maintain the taxes and to reserve those which set them aside.

AVOCATS

qui ont occupé dans ces causes en Cour Supérieure et en Appel.

LACOSTE, GLOBENSKY, BISAILLON et BROSSEAU, pour *Lambe* ès-qualité, dans toutes les causes.

KERR, CARTER et GOLDSTEIN, pour *The North British & Mercantile Insurance Company*, et *The Export Lumber Company.*

ABBOTS, TAIT et ABBOTS, pour la *Banque d'Ontario*, la *Banque des Marchands du Canada* et la *Banque Molson.*

MACLAREN, LEET et SMITH, pour *The Canadian Bank of Commerce.*

ARCHIBALD et MCCORMICK, pour *The Williams Manufacturing Company.*

GREENSHIELDS, MCCORKILL et GUÉRIN, pour *The Ogdensburgh Coal & Forwarding Company.*

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